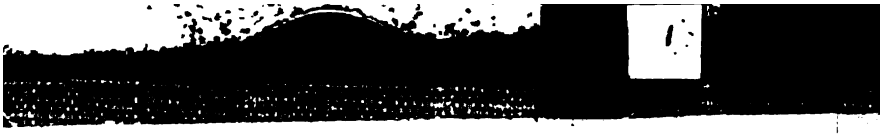

Columbia University Lectures

THE MECHANICS OF LAW MAKING

THE CARPENTIER LECTURES

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THE MECHANICS OF LAW MAKING

BY

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CLERK OF THE HOUSE OF COMMONS

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PREFACE

THIS volume contains the Carpentier Lectures delivered by me in October, 1913, subject to some prunings, and with the addition of matter for the delivery of which time did not suffice. I have reproduced freely passages previously published in my *Legislative Methods and Forms*, and elsewhere, but where I have borrowed without acknowledgment, the borrowing has been from myself.

C. P. I.

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I

THE LEGISLATURE AND THE DRAFTSMAN

WHEN President Butler invited me to give a course of lectures on the Carpentier foundation, he told me that there is at the present time a great amount of interest in the United States on the subject of bill drafting and improvement in the form of statutes; that your legislatures are slow in accepting the suggestion of seeking technical assistance in the preparation of statutes; and that you have little exact information, and still less experience, upon which to determine the best method of organising and conducting expert drafting service. I have heard the same thing from other sources. For instance, I have heard a good deal about what has been done by Dr. McCarthy and his friends in Wisconsin, and I am indebted to Mr. Herbert Putnam, your Librarian of Congress, for a most useful memorandum on bill drafting and legislative reference bureaus, and to him and to Mr. Parkinson of the Legislative Drafting Research Fund, and to Mr. David Thompson, for some very interesting reports and other documents relating to the agencies which have been established or proposed for the drafting of legislative measures, and also for the collection and provision of materials required for the purpose of legislation. And I gather from these documents that in the opinion of some competent authorities useful hints may be derived by your legislators from the legislative experiences of other countries, including England. Now I happen to have had a good deal of experience in the craft of drawing legislative measures, for

I have held in my time the posts of parliamentary counsel or government draftsman in England, and of law member of the Governor-general's Council in India. And, remembering as I do the great kindness which I have always received from your countrymen when I have applied to them for information about their institutions, I felt it almost incumbent on me as a duty to accede to President Butler's request, and to endeavour to place at your disposal such results of my special experience, and such special knowledge acquired in the practice of my craft, as might possibly be of service to you. If you care to listen to what can be said by a veteran draftsman on his special subject, I shall be grateful for your patience and forbearance.

I had thought at one time of entitling my lectures "The Making of Laws." But I came to the conclusion that this would be too ambitious a title, and might be misleading. It might suggest the names of the great law-givers of the world — historical or mythical — such as Hammurabi, Moses, Lycurgus, Solon, Justinian, Napoleon. It is not of such high themes that I propose to discourse. My aim is much more modest and practical, and it is in order to indicate the limitations of my subject that I propose to describe it as the Mechanics of Law Making.

It is always useful to compare our institutions with those of other countries. From such measure of success as our neighbours have obtained we may derive instruction and encouragement; from their failures we may derive cautions and warnings, and also consolation. In any case we obtain a juster and more complete notion of what we ought to aim at, how we should set to work, and how much, in this imperfect world, we may reasonably hope to effect. The best I can do for you is to give you some of the results of my

special knowledge and experience, and leave you to draw such inferences as may appear to you to be usefully applicable.

But before doing so I must utter some words of warning. The conditions of legislation in England are very different from the conditions of legislation in the United States, whether in Congress or in the State legislatures; and it is only with many doubts, qualifications, and reservations that one can venture to apply English experience to American facts.

Among the many differences, two stand out with special prominence. The first difference arises from the limitations on the powers of your legislatures. The Parliament at Westminster is sovereign in a sense in which no American legislature, whether Congress or a State legislature, is sovereign. Parliament, some sage of the law is supposed to have said,—sayings of this kind are usually attributed to Coke,—Parliament can do anything except turn a man into a woman. There are a great many things which Parliament would not venture to do, would not think of doing, would be far too sensible to attempt. But there are very few things, if any, which a court of law could prevent it from doing. I am not aware of any case in which an Act of our Parliament has been declared invalid by a court of law. It would be very difficult to find or suggest any ground on which its invalidity could be successfully urged. People sometimes talk about an English Act as being unconstitutional. What we mean in England by 'unconstitutional' is something which, in our opinion, is not in accordance with the fundamental principles of our constitution. But the adjective is often used merely as a political epithet indicating disapproval, on grounds which may or may not be weighty. And, in any case, it has no legal connotation; it signifies nothing of which our courts of law could take cognizance.

In this country the word has a very different signification, and you are all familiar with cases in which an American statute has been declared by a competent court to be invalid, and has thereby been deprived of its legal effect. This is, of course, because the powers of your legislatures are legally limited by the constitution of the United States, and by the constitutions of the several States which the legislatures represent. Those who frame and take part in passing your laws have constantly to bear these constitutions in mind, just as those who prepare and make bye-laws and statutory rules in England have to bear in mind the limitations on the powers which are being exercised. If they failed to do so, they would find their labours frustrated by the legitimate action of the courts. English courts can and sometimes do drive a coach and four through an English Act by discovering and declaring authoritatively that it means something different from what it is supposed to mean. But this is a process of interpretation, not of disallowance. Its exercise may show that the legislature has not used its powers in such a way as to render its meaning clear. It does not show that the legislature has exceeded its powers. These are two different things. The draftsman of an American statute has to guard against two risks, that of its being misinterpreted and that of its being disallowed. The draftsman of an English Act has only to guard against one of these risks. But that risk alone is enough to task seriously his knowledge, his accuracy, and his powers of expression. By misinterpreted I do not mean wrongly interpreted — that would be a reflection on the judges — I only mean interpreted in a sense different from that intended or supposed by some of the authors of the measure.

The British Parliament, then, is sovereign. The United

States Congress and the legislatures of the several States are not sovereign. The powers of your legislatures are, as you know, and, as an Englishman soon discovers, defined, limited, and restricted in many ways by law, and the tendency of your modern State constitutions apparently is to multiply and increase these limitations and restrictions, to exclude many matters from the competency of the legislature, to limit the duration and frequency of legislative sessions, and, in some cases, to transfer powers from the elected legislature to the general body of electors by such devices as the initiative and the referendum. In the United States the courts are charged not only with the duty of interpreting laws made by the legislatures, but also with the duty of determining the validity of laws so made, of deciding whether any particular law so made is, or is not, within the competency of the legislature which made it or affected to make it. Thus, for instance, in the United States the validity of an Income Tax Act may be, and has been, questioned in a court of law. In England the effect of an Income Tax Act is often questioned in a court of law, but the validity of the Act could not be so questioned. Since I began to put together the notes for these lectures I have come across a useful and suggestive little book by Mr. Chester Lloyd Jones,[1] and I observe that the first part has for its heading "Limitations on Legislative Action." Now in my country a heading such as this would be needed in a treatise on bye-laws or statutory rules, or in a treatise on legislation in British India, or in one of our great self-governing dominions where the powers of the legislatures are limited and defined by written constitutions. But it would not be needed in a

[1] *Statute Law Making in the United States*, Boston. The Boston Book Company. 1912.

treatise on English statute law. The legislative powers of the British Parliament are unlimited; at least they are not limited by law.

Let me give an illustration of the differences between the powers of the Parliament at Westminster and the powers of the legislatures in the United States. I learn from Mr. Lloyd Jones's book that several of your legislatures have passed statutes about what he calls "Title Requirements," statutes of which the object is to prevent the inclusion of multifarious matters in the same law, and the inclusion in any legislative measure of provisions incongruous with its descriptive title. Our eighteenth century statute book contains some bad specimens of what used to be called "hodge-podge Acts," Acts containing a number of miscellaneous enactments huddled together without reference to their congruity. For instance, a Window Tax Act of 1747 contains a section declaring that all existing and future statutes which mention England are also to extend to Wales and Berwick upon Tweed, though not particularly named.[1] Now such monstrosities as these no longer deface our statute book. But their recurrence has been prevented, not by statute, but by our rules of parliamentary procedure, by improvements in our parliamentary practice, and by the vigilance of the authorities of the House of Commons; that is to say, of the Speaker and the chairmen of committees, acting with the advice and assistance of the officers of the House. If the House should be of opinion that the subject-matter of a bill would be more properly dealt with by two or more bills, it would direct that the bill be divided accordingly. If the Speaker should come to the conclusion

[1] This section still survives, and is the sole survivor among the provisions of the Act into which it found its way.

that a particular provision in a bill falls outside the proper scope of the bill as indicated by its title and general character, he could, under his authority, stop the further progress of the bill. If the Speaker should think that the title of a bill is insufficient or inappropriate, he might suggest its amendment at the proper stage. And such amendments are not infrequently made, without the intervention of the Speaker or any other authority, when the measure in question is restricted, extended, or otherwise altered in the course of parliamentary discussion. If, as frequently happens, the Speaker or a chairman of a committee is of opinion that a suggested amendment or new clause is outside the proper scope of the bill, he will rule it out of order and not allow it to be proposed.

But, in England, when a bill has been passed and has become law, there can be no question of its invalidity on the ground of misdescription. Such a question could not be raised before our courts. The courts would hold that the question of misdescription, or of the propriety or impropriety of including a particular provision in a particular Act, is a question which the legislature must settle, and must be presumed to have settled, and was not one for the courts to decide. Our courts would know that there is nothing of which our House of Commons — I speak of that House as the predominant partner in our legislature — that there is nothing of which our House of Commons is more jealous than of its autonomy, of its exclusive power to regulate its own practice and procedure without any interference by any external authority. This jealousy recently received a conspicuous illustration in the discussions on a recent Act, about which we have heard, are still hearing, and are likely to hear a good deal in England, and about which you have

doubtless heard something over here. I mean the Parliament Act of 1911. That Act regulates the relations between the two Houses of Parliament. It draws a distinction between what it calls money bills, a term specially defined, and other bills, and enacts that a money bill, unless assented to within a limited time by the House of Lords, and any other bill, after having been passed three times by the House of Commons in three successive sessions, and after a specified interval, may be presented for the royal assent, and become law without the concurrence of the House of Lords. But, it was asked, when the measure was under discussion, who was to determine what was a money bill? And who was to decide whether the stages required by the Act had been duly passed and whether the formalities required by the Act had been duly observed? Several external authorities, including the courts of law, were, as was natural, suggested for this purpose. But the House of Commons would have none of them. It is for the Speaker of the House to determine and certify under the Act whether a bill is, or is not, a money bill. It is for the Speaker to determine and certify, in the case of other bills, whether the provisions of the Act have been duly complied with. And the certificate of the Speaker is to be conclusive, and is not to be questioned in any court of law. Nor does the Act go into details as to the procedure to be observed in passing these bills through the House of Commons. All such matters are to be determined by the House itself. There could not be a stronger instance of the assertion by the House of Commons of its paramount and exclusive autonomy.

This sovereignty of Parliament is one important difference to be always borne in mind in comparing American legislatures with the British Parliament. Another and perhaps

even more important point of difference is the sharp line of distinction which you draw in the United States, but which we do not draw in the United Kingdom, between the functions of the legislature and the functions of the executive; the mode in which and the extent to which the theory or doctrine of the separation of powers — a doctrine for which we are indebted mainly to Montesquieu — is applied by and forms an integral part of your constitution. In England the prime minister and the members of his cabinet, the leading ministers of the Crown, who represent the executive power, always are, and practically must be, members of the legislature. In the United States neither the President, nor any member of his cabinet, can be a member of Congress. In England all the more important bills, and an enormous proportion of those which become law, are introduced by some member of the government, by some one who sits on the Treasury bench, and are carried through Parliament on the responsibility of the government, by means of the authority and influence which the government exercises, and by use of the large share of parliamentary time to which the government is entitled. These bills are called government bills as distinguished from private members' bills. It is with this class of bills, and with this class only, that the English government draftsman, the parliamentary counsel to the Treasury, who holds the office which I once held, is concerned, except when he is called upon, as he occasionally is, to criticise the form of private members' bills and to mould into better shape such of them as are given a helping hand by the government, on condition of accepting any amendments which the government may consider necessary. But in the legislatures of the United States there is no Treasury bench, there are no government bills. Every bill is what would be

called in England a private member's bill. No doubt, a president or governor who combines political tact and judgment with force of character can, by the exercise of personal influence, do a great deal to shape the course of legislation. But, technically, I suppose, all that he can do is to recommend legislation on a particular subject, or to suggest informally the expediency of amending in a particular direction legislative measures proposed, or to exercise his limited power of veto over measures which meet with his disapproval either in form or in substance. And even these powers of intervention are, I understand, apt to be looked upon with some amount of jealousy and suspicion, as encroachments by the executive on the proper functions of the legislature. Cabinet government, as it is understood and practised in England, is based on the close co-operation, interaction, and interdependence of the legislature and the executive. Presidential government, as it is understood and practised in the United States, is based on the separation and independence of the legislature and the executive. Each system has its advantages and disadvantages. The differences between them affect legislation in every form and at every stage.

These two differences, first, the sovereignty of Parliament as compared with the limited powers of American legislatures, and, secondly, the co-operation of executive and legislative functions in England as compared with the separation between the legislature and the executive in the United States, are perhaps the most cardinal differences between English and American methods of legislation. There are other differences, also, on some of which I may have to touch hereafter, and at some of which I shall glance at this stage.

One of them is the distinction which is drawn at West-

minster, but which is not drawn, or at all events is not drawn in the same way or to the same extent over here, between what we call public bills and what we call private bills. We recognise the distinction very clearly in our legislative procedure. The precise point at which the boundary line is to be drawn between the two classes of bills is not always quite easy to determine, but the distinction of principle is clear enough. The object of a public bill, as we use the term, is to alter the general law. The object of a private bill is to alter the law relating to some particular locality, or to confer rights on, or release from liability, some particular person or persons. The procedure for passing private bills [1] differs materially from the procedure for passing public bills and the distinction between the two classes of measures is recognised also in our classification of statutes. A public bill, when it becomes law, is placed among our public general Acts. A private bill, when it becomes law, is placed in the volumes containing local and personal Acts.

Another difference, which also strikes an Englishman very forcibly when he looks at a collection of American statutes, is that you regulate by statute, by direct action of the legislature, a vast number of matters which we should leave to be regulated by executive action, by administrative orders, by orders in council, or by what we call provisional orders and statutory rules; that is to say, orders and rules which are made by executive authorities under powers delegated by the legislature, and which in some cases require approval or confirmation by the legislature before they can take full effect as law. Of course this difference is very closely connected with the separation which you make between legis-

[1] On this procedure see Mr. Bryce's address to the New York Bar Association, printed in his *University and Historical Addresses*.

lative and executive powers. Your legislatures, having been warned off the province of the executive, are constantly, at least so it seems to us, trespassing over the boundaries of that province. Our executive, you might perhaps reply, is constantly taking upon itself functions which belong to the legislature. I do not say that our way is the best, but it certainly does present some undeniable advantages. This subject, the subject of delegated legislative powers, is one to which I shall return hereafter.

I have referred to the dissatisfaction which is alleged to exist with the form of your statute law. Dissatisfaction of that kind is by no means confined to the United States. It exists, and has found vigorous expression, not only in the United Kingdom, but in most continental countries. Indeed, I do not know of any country which is in so happy, or, shall I say, in so apathetic a condition that its citizens do not grumble with the work of its legislators. To do so, if they are free citizens, is their privilege and their duty. Legislation is largely based upon grumbles — they used to be called grievances in the times of the Plantagenet Parliaments — it cannot claim to be exempt from them. The ordinary citizen will grumble, and as to the lawyer, he has a special feud of his own. The modern English lawyer is apt to regard common law and statute law as hereditary foes. 'My Lady of the Common Law,' the lady with whose character, history, and adventures you have recently been made familiar by Sir Frederick Pollock,[1] 'My Lady of the Common Law,' he would be inclined to say, 'regards with jealousy the rival who arrests and distorts her development, who plants ugly and inartistic patches on her vesture, who trespasses gradually and irresistibly on her domain.'

[1] *The Genius of the Common Law.* Columbia University Press. 1912.

As I have referred to Sir Frederick Pollock, I am tempted to make some quotations from an interesting essay which he published more than thirty years ago on "Some Defects of the Common Law," an essay in which, it is fair to say, he metes out with equal severity criticisms of our English statute law and criticisms of our English case law. With his criticisms of case law I am not at present concerned, but his remarks on statute law are very pertinent to the matter with which I have to deal. They occur under the heading "Desultory Legislation": —

In order to legislate in a satisfactory manner upon any given subject, several qualifications are necessary in the law-giver. In the first place, he must know accurately what the existing law on that subject is. He must be no less clearly aware in what respects he is not content with it, and why. He must further have formed a clear conception of the changes in its effect which he desires to produce. Nor is it enough to have a distinct intention founded on exact knowledge. The law-giver must also have the skill to express that intention in apt, sufficient, and unambiguous terms, which shall make his purpose plainly understood, if possible, by those who have to obey the law, but in any case by those who have to administer it. Parliamentary legislation, however, is carried on, with rare exceptions, under circumstances and in a manner which effectually prevent most or all of these conditions from being satisfied. The difficulty of knowing the actual state of the law is on many questions considerable, even for experts, and most laymen do not so much as know how great the difficulty is. Hence well-meaning and otherwise well-informed men often bring forward proposals which they suppose to be improvements of the law, and which might be so if the existing law were such as they suppose it to be, but which in truth are either superfluous or inappropriate. It is likewise a common state of mind, even among educated persons, to have a sense of dissatisfaction or hardship without attempting to fix in one's mind the real point where things are amiss. And this vague feeling that something must be done, somebody indemnified, or somebody else made answerable, is a constant force

tending to unconsidered legislation. When our crudely formed and more crudely executed intentions fail to bear fruit, as they naturally do, we are apt to think, not that we have legislated badly, but that we have not legislated enough, and so blunders raise up blunders, and the stock increases and multiplies. Technical skill, again, is often below the mark, if not altogether wanting, especially in the amendments which may seriously disfigure the most artistically drawn bill. In fact, the more artistic the original composition is, the more it will suffer from piecemeal alterations. The kind of skill required includes many elements. First comes power of expressing ideas clearly, which is not so common as many people think. Familiarity with the appropriate technical terms is of course needful, and besides this there should be knowledge of the manner in which the language of statutes is looked at by those who have to interpret it. There must yet be added the faculty of scientific imagination which can foresee the various consequences of a proposed enactment in its relations to the various persons and transactions affected by it. We shall offer no insult to the intelligence of members of Parliament in saying that most of them are without these special qualifications. Nor is there any expert or set of experts whose business is to guide or superintend the technical part of legislation. The result is that Acts and clauses are passed to which it is all but impossible to attach a definite meaning, which produce unexpected and absurd consequences, or which, being intended to settle doubtful points, only raise up new doubts in addition to the old ones. Many an Act of Parliament, originally prepared with the greatest care and skill, and introduced under the most favourable circumstances, does not become law till it has been made a thing of shreds and patches hardly recognisable by its author, and to any one with an eye for the clothing of ideas in comely words no less ludicrous an object than the ragged pilgrims described by Bunyan: "They go not uprightly, but all awry with their feet; one shoe goes inward, another outward, and their hosen out behind; there a rag and there a rent, to the disparagement of their Lord."

Sir F. Pollock illustrated his remarks by referring to the English Partnership Act of 1865, which, after having been

steered through the two Houses of Parliament by such eminent lawyers as Lord Selborne (then Sir Roundell Palmer) and Lord Westbury, was pronounced a few years later by an eminent judge to be based on a misunderstanding of a judicial decision and to leave the law practically as it stood before.

"The singular part of this story," says Sir F. Pollock, "is that the misunderstanding was shared by the law officers of the Crown, all the law lords (two of whom had been parties to the decision) and, it would seem, the legal profession generally."

The amateur or lay legislator, the legislator who does not profess to be a lawyer, will probably note with grim satisfaction the fallibility of distinguished lawyers on the question what is the law which it is proposed to amend, and what will be the effect of the amendment which they propose as a remedy. But the moral which I desire to draw is, not that knowledge of the law is useless to the legislator, but that such knowledge is sometimes difficult, it may be unnecessarily difficult, to acquire. In what ways its acquisition has been, or may be, made easier, is one of the subjects on which I shall have to touch.

I have quoted at some length from Sir F. Pollock's essay, partly because I wish to dissipate any erroneous notion that I am holding up English statute law as a model to be followed by American legislators — nothing could be further from my mind — partly because I cannot improve on his statement of the qualifications required for a legislator, for a man who takes upon himself the responsibility of introducing and endeavouring to pass a new law. Let me summarise what he says. The legislator should know the law. He should know the facts. He should know exactly what he means to do. He should know how to express his meaning clearly. And if the legislator should know these things, so

also should any legislative draftsman whom he may employ as an expert. He is not bound to employ any such expert, though, if he is an amateur in the art of bill drafting, he would probably act wisely in doing so. But if he does, let him not suppose that he thereby exonerates himself from the labour of getting up the subject himself, or divests himself of any responsibility for his proposals. In my parliamentary experience any member who tried to rely exclusively on his draftsman for knowledge of his subject, or for explanation of what was meant or would be effected by his bill, was apt to fare very badly. I mention this point because some of your legislators have expressed fears lest the employment of draftsmen would mean the transfer of legislative responsibility to experts. In my judgment there is no foundation for any such fear.

What kind and amount of knowledge is required? Of course, law is an admirable science, and the more a man knows of it the better. But you can be a good legislator and a good draftsman without being a profound lawyer, or even an all-round lawyer. You should have some familiarity with the general principles of law and legislation. For instance, take one of the first questions which he who takes upon himself the responsibility of proposing a new law often has to ask himself. Assuming that the existing law does not meet the case, is there really a sufficient case for a new law? Cannot the matter be left, would it not be more safely and properly left, to the action of public opinion, or of those other extra-legal sanctions by which the greater part of human conduct is regulated? The question will often be answered in accordance with personal proclivities either towards individualism on the one side, or State action — I will not call it socialism — on the other. But it has

to be present to the mind of every legislator, and the answer to it is to be found in the experience derived from the actual working of other laws and institutions, with due allowance for differences arising out of national character, social and economic conditions, and so forth.

Knowledge of this kind ought to be part of the general equipment of a legislator. What special knowledge of law is required for particular cases of legislation? If the object is to alter a particular rule of law, such as the rule of partnership law to which Sir F. Pollock referred, of course you must know precisely what the rule is, its history, its development, its application, the cases decided upon it. But so far as my experience goes, the great majority of Acts of Parliament, and I presume of United States laws also, are not concerned, except incidentally, with what I have called elsewhere lawyers' law. If you analyse the contents of the British statute book — I mean the public general statutes, not the measures which in our country fall within the domain of private bill legislation, the grant of what you would call franchises and so forth — if you analyse our collection of public general Acts, you will find that the proportion of enactments which alter rules or principles of the common law is very small, and that the object of by far the greater part of them is to make some alteration in the administrative machinery of the country.

Some improvement of administrative machinery is suggested, and among the questions which the framer of the proposed measure has to consider are these: What powers and duties already exist for the purpose contemplated? By whom are they exercised and performed? What is the appropriate central authority? What is the appropriate local authority? What should be the relations be-

tween them? What kind or degree of interference with public or private rights, either by the courts or by the central authority, will be tolerated by public opinion? How is the money to be found? How is the change to be introduced so as to cause the least interference with existing rights and interests, the least friction with existing machinery? And last, but not least, what provisions of the numerous Acts of Parliament bearing on the subject are to be applied, superseded, or borne in mind? These are questions which a practising lawyer does not often have to consider, but which, at least in England, arise in the preparation of almost every public legislative measure. Many of them are questions rather for the legislator than for the draftsman. But they are questions on which the draftsman is often expected to advise, and on which the knowledge he has acquired often enables him to give useful advice. With the provisions of the statute law bearing on the subject, he is always expected to be familiar, and one of his most difficult tasks in the preliminary work which has to be gone through before a bill is drawn, is that of threading his way through what is often a jungle of legislative enactments.

It is his duty to master and understand the complicated provisions of the existing statute law relating to the matter in hand, to know how they have been construed in practice, and what construction has been placed upon them by courts of law, to point out what obscurities, ambiguities, inconsistencies, or other defects they present, and to indicate in what cases and in what manner these defects may most suitably be removed by fresh legislation. But he must not expect that his advice on these points will always be followed. There are often good reasons, political or tactical, sometimes more easily appreciated by the politician than by the lawyer,

but in many cases very sound and cogent, against the adoption of counsels of perfection urged, and properly urged, by the draftsman from the legal point of view.

Let me give you an illustration from my own experiences as a draftsman. A good many years ago I drew a bill which became law as the Municipal Corporations Act, 1882. It is a piece of work to which, after the lapse of more than forty years, I look back with some satisfaction. I could not have accomplished it if I had not been working with the advice and assistance of one of the most careful and skilful draftsmen of that day, the late Sir Francis Reilly. It consolidated nearly 80 Acts, and reproduced the law in what I believe to have been found to be a convenient and intelligible form. Now the work of consolidating statutes involves a great deal more than the use of scissors and paste. There are always gaps to be filled, obscurities to be removed, inconsistencies to be harmonised, and doubts to be resolved. When questions of this kind arise, the draftsman cannot take upon himself the responsibility of deciding them, though he may have and express an opinion as to the best mode of dealing with them. But the decision of these questions involves the exercise of legislative discretion, and the responsibility for deciding them in the most judicious way must rest with the minister or other member who takes charge of the bill. The duty of the draftsman is to point out clearly the doubts and difficulties so that there may be no risk of their being overlooked.

Now I had studied with much care the numerous judicial decisions on the several Municipal Corporations Acts which the consolidation bill was to supersede, and had written notes upon them. Amongst other things I noted that there seemed to be room for some doubt as to whether women

were or were not eligible to seats on municipal councils and that, though I thought that according to the best construction they were not, perhaps the doubt ought to be removed. However, the minister who took charge of the bill told me that he was himself in favour of giving women seats on these councils, and that if that right was open to doubt under the existing law, he would, in reproducing the law, give them, or leave them, the benefit of the doubt. So it was resolved to 'consolidate the doubt,' as draftsmen sometimes call it; in other words, to leave the law neither more nor less clear than it had previously been. This happened just before I left England for India, and the bill became law during my absence. Soon after my return I had, in the capacity of assistant parliamentary counsel to the Treasury, the post which I then held, to take part in preparing another bill, which became law as the Local Government Act of 1888. The problem with which that measure had to deal was one of exceptional complexity and difficulty. The main objects aimed at were: first, to set up new elective bodies for counties, and secondly, to transfer to these bodies certain administrative functions exercised by other authorities, including justices of the peace. And the method adopted in framing the bill was the method of legislation by reference, a method which is frequently denounced, and which often deserves the denunciations hurled against it, but for the adoption of which there was, I think, a pretty strong case in this particular instance. As to the constitution and election of the new bodies to be set up, the leading notion was to make them resemble as nearly as possible the councils of municipal boroughs. Now the law relating to the constitution and election of municipal councils had recently been reduced into a fairly compact and intelligible form by the

passing of the consolidation Act to which I have referred. A large number of persons throughout the country were familiar both with the contents and with the practical working of this law. In these circumstances the plan adopted was to enact that the municipal law should apply to county councils subject to certain modifications. This method of legislation possessed considerable advantages, both from the parliamentary and from the administrative point of view. It presented to Parliament a single issue; namely, whether the municipal system should be adopted or not. If the municipal provisions had been repeated in the new bill, they would have run to an inordinate length, every detail of them would have been open to discussion and amendment, and the result of the discussion would probably have been to introduce a large amount of variation, both in language and in substance, between the law applicable to borough councils and the law applicable to county councils, and thus to destroy that uniformity of law and procedure which so materially facilitates administration. For these reasons, be they good or bad, the provisions of the Municipal Corporations Act of 1882 were incorporated or applied by reference in the Local Government Bill of 1888.

It was my duty to point out, and I did point out, the doubt about women's rights to be elected. But the minister in charge of the bill replied, as ministers often do, that this was a question which might be left to stand over until the bill reached the committee stage. The clause raising the doubt was not reached in committee until July. It was, if I remember rightly, a very hot July. Members were weary, and anxious to get away into the country. The bill had been introduced by a conservative government, but was not very popular with the conservative party. They did not regard

with much favour the transfer of power from justices of the peace to elective councils. The measure was looked on with more favour by the opposition, and the minister in charge of the bill was warned by his whips that if its progress should be retarded by any serious obstacle, there was a serious risk of its being wrecked. He was also advised that any amendment raising a question of women's rights would mean a three days' debate. The result was an informal conference behind the Speaker's chair between representatives of the front government bench and representatives of the front opposition bench. It was arranged that if the government did not raise the question, the opposition front bench would not, and it might be hoped that no one else would discover or raise the point. Nobody else did, and so the Act became law with the doubt unresolved.

But in the very next year the question as to the eligibility of women to the London County Council was raised in the courts of law,[1] and, after much argument and long debate, was decided against the women. Much was said by journalists and by the public about the carelessness and slovenliness of the draftsman who had left such an important point open to doubt. But I am bound to say that no similar language was used by the learned judges who decided the case. Our judges sometimes speak severely about the language of Acts of Parliament, and do not always make sufficient allowance for the difficulties which the draftsmen of statutes have to encounter. But in this case their utterances contained nothing to which a susceptible draftsman could take exception. How far any blame attached to the draftsman in this particular case, you are in a position to judge from what I have told you. Whether the minister

[1] *See Beresford-Hope* v. *Lady Sandhurst*, 23 Q.B.D. 79, May 16, 1889.

who had to decide between the risk of losing his bill and the responsibility for leaving the law obscure adopted the right course is a nice question of political ethics. His dilemma might perhaps suggest to students of fiction the dilemma of Mr. Frank Stockton's hero in his amusing story of *The Lady or the Tiger*.

II

THE REFORM OF THE ENGLISH STATUTE BOOK

I REFERRED in the preceding chapter to the difficulties experienced by English legislators and draftsmen in threading their way through the mazes of the English statute law. It is probable that your legislators and draftsmen have to encounter similar difficulties. Perhaps, therefore, it may be worth while to tell you something about the steps which we have taken in England, with more or less success, to make our statute law more accessible, more intelligible, a little easier to explore.

There are two main questions which I shall ask you to consider: —

1. What attempts have been made in England to improve the form of our statute book, of our general body of statute law, how far have those attempts been carried, and how far have they been successful?

2. What attempts have been made to improve the form of our current legislation, and what measure of success have they obtained?

In order to answer the first of these questions, I must make a short excursion into history. But my retrospect must be brief, for I am merely summarising what I have described at greater length elsewhere.[1]

The condition of the English statute book engaged the attention of the Crown and of the legislature at an early date of English parliamentary history. I will go as far back

[1] *Legislative Methods and Forms.* Oxford. 1901.

as the year 1551. In that year King Edward VI, then a boy of fourteen, and a very precocious youth, wrote as follows in his *Discourse on the Reformation of Abuses:* "I have shewed my opinion heretofore what statutes I think most necessary to be enacted this session. Nevertheless, I would wish that beside them hereafter, when time shall serve, the superfluous and tedious statutes were brought into one sum together, and made more plain and short, to the intent that men might better understand them; which thing shall much help to advance the profit of the Commonwealth." "But this," observes Bishop Burnet, "was too great a design to be set on foot or finished under an infant king."

Now let me pass on to the reign of Queen Elizabeth. During her reign Sir Nicholas Bacon (father of the great Francis Bacon), when Lord Keeper, drew up a scheme for reducing, ordering, and printing the statutes of the realm. The heads were as follows: "First, where many lawes be made for one thing, the same are to be reduced and established into one lawe, and the former to be abrogated. Item, where there is but one lawe for one thing, that these are to remain in case as they be. Item, that all the Acts be digested into titles and printed according to the abridgement of the statutes. Item, where one part of one Acte standeth in force and another part abrogated, there shall be no more printed, but that that standeth in force. The doeing of thse things maie be committed to the persons hereunder written, if it shall so please Her Majestie and Her Counsell, and daye wolde be given to the committees until the first daie of Michlemass Terme next coming for the doing of this, and then they are to declare their doings, to be considered by such persons as it shall please Her Majestie to appoint."

King James I, in a speech from the throne (1609), spoke of "divers cross and cuffing statutes, and some so penned that they may be taken in divers, yea, contrary senses"; adding "and therefore would I wish both these statutes and reports, as well in the Parliament as common law, to be once maturely reviewed and reconciled; and that not only all contrarieties should be scraped out of our bookes, but even that such penal statutes as were made but for the use of the time (from breach whereof no man can be free) which do not now agree with the condition of this our time, might likewise be left out of our bookes, which under a tyrannous or avaricious king could not be endured. And this reformation might (me thinkes) bee made a worthy worke, and well deserves a Parliament to be set of purpose for it." A commission was appointed in the following year, and a MS. in the British Museum is probably the fruit of its labours.[1] It contains a list of the statutes from 3 Edw. I to 2 Jas. I which had been repealed or had expired, and suggestions for further repeals and changes.

In 1616 Sir Francis Bacon, then Attorney-general to King James the First, submitted to the King a proposition "touching the compiling and amendment of the laws of England."

"The work to be done," according to this proposition, "consisteth of two parts, the digest or recompiling of the common laws, and that of the statutes.

"For the reforming and recompiling of the statute law, it consisteth of four parts.

"1. The Government to discharge the books of those statutes whereas" (*qu.* wherein) "the case by alteration of time is vanished, as Lombards, Jews, Gauls, halfpence &c.

[1] MS. Harl. 244.

Those may, nevertheless, remain in the libraries for antiquities, but no reprinting of them. The like of statutes long since expired and clearly repealed; for if the repeal be doubtful, it must be so propounded by Parliament.

"2. The next is to repeal all statutes which are sleeping and not of use, but yet snaring and in force. In some of those it will perhaps be requisite to substitute some more reasonable law instead of them, agreeable to the time; in others a simple repeal may suffice.

"3. The third, that the grievousness of the penalty in many statutes may be mitigated, though the ordinance stand.

"4. The last is the reducing of convenient statutes heaped one upon another to one clear and uniform law.

"Of the last part," he said, "much had been done by Lord Hobart himself, Serjeant Finch, Heneage Finch, Noye, Hackwell, and others. The best way to carry out the work would be to have commissioners appointed by the two Houses."

In the time of the Commonwealth two committees, which included such distinguished men as Bulstrode Whitelocke, Sir Matthew Hale, and Ashley Cooper (afterwards the great Lord Shaftesbury), were appointed with instructions "to revise all former statutes and ordinances now in force, and consider, as well, which are fit to be continued, altered, or repealed, as how the same may be reduced into a compendious way and exact method for the more ease and clearer understanding of the people." But no tangible results appear to have been achieved.

After the Restoration, the subject was again inquired into by Lord Nottingham and others, but nothing was done, and the question appears to have slumbered until the end of the eighteenth century.

England underwent great changes in the eighteenth century. Walpole and his successors built up that half unconsciously designed but subtly framed system of government to which Walter Bagehot has given the name of the Cabinet system. Wesley revitalised religious life. The industrial revolution radically altered the economic features of English society. Lord Mansfield, with the help of his special juries, systematised and gave form to the rules of English commercial law. But the eighteenth century, though it gave birth to your constitution, was not an age of great legislation in England. It was, with very few exceptions, not marked by any statutes of great legal or constitutional importance. Many things slumbered in Parliament, and among them projects for improving the English statute book.

It was not until near the end of the century that interest in the subject was revived. In 1796 two reports, presented by committees of the House of Commons, called attention to the unsatisfactory condition of the statute book, and led to an improvement in the classification of statutes, and to the distinction now recognised by us between public general Acts, local and personal Acts, and private Acts. On this distinction I shall have to touch later on.

The Parliament of 1800 (the Parliament which passed the union with Ireland) passed resolutions which led to the appointment of the First Commission on Public Records, and it was under the authority of this Commission that was prepared the edition of the statutes known as the "Statutes of the Realm." This edition, in nine great folio volumes, is the most authoritative edition of the English statutes down to the end of the reign of Queen Anne, and the elaborate introduction to it, though its learning is now a little out of

date, contains a mass of interesting information on the history and condition of the English statute law.

In the 'twenties' of the last century Sir Robert Peel did a good deal towards improving both the form and the substance of the English statutory criminal law.

Then came the Reform Act of 1832, and the influence of Jeremy Bentham, perhaps the greatest of law reformers, at once made itself felt in the reformed parliament.

In 1833, when Lord Brougham was Lord Chancellor, a royal commission was appointed with instructions:—

(1) To digest into one statute all the statutes and enactments touching crimes and the trial and punishment thereof, and also to digest into one other statute all the provisions of the common or unwritten law touching the same;

(2) To inquire and report how far it might be expedient to combine those statutes into one body of the criminal law; and

(3) Generally to inquire and report how far it might be expedient to consolidate the other branches of the existing law of England.

John Austin, the well-known writer on jurisprudence, was appointed a member of the Commission. But he did not find the work congenial, and he soon resigned. The Commission presented seven reports, and were engaged on the eighth when they were dissolved in 1845.

They were succeeded by another commission which was appointed in 1845 and made seven reports, the last of which appeared in 1849. Then came Lord Cranworth's Board for the revision of the statute law, a Board which was constituted in the first instance as a temporary and experimental body, and which, after making three reports, was superseded by a Statute Law Commission of 1854, consisting of Lord

Cranworth himself and some of the most distinguished lawyers of the time.

I will not weary you with the details of the work done by these Commissions and this Board. Their reports are full of learning, and contain many valuable suggestions, some of which have borne useful fruit. But in course of time considerable dissatisfaction was expressed, both in Parliament and in public, with the nature of their work, and with their rate of progress. It was complained that they wrote too much, cost too much, and did too little or, at all events, that the tangible results of their work were very small. And so they came to an end.

The truth appears to be that these learned bodies were too ambitious; they aimed at too many things; they did not realise how little it was humanly possible to achieve within a limited time; they did not form a sufficiently clear conception of the mode in which, and the machinery by which, the several branches of the work proposed by them should be carried out, or of the relative importance and urgency of those branches. But, as I have said, the labours of the Commissions were not unfruitful. It gradually became clear, and largely through their inquiries and recommendations, that there were several distinct, but related, lines along which the work of improving the form of the law should be carried out, that the work to be performed on each of these lines would be difficult and laborious, would require patient, plodding, unobtrusive labour, would take much time, and ought not to be scamped.

These different lines or branches of work may be described under five heads: 1. Indexing, 2. Expurgation, 3. Revision, 4. Consolidation of Statute Law, and 5. Codification. This last branch of work, codification, stood in a different category

from the others, as being, if desirable, rather an ideal to be aimed at than a programme likely to be realised, at all events, in the near future. I say, "if desirable," because there were and are lawyers of great eminence who consider codification of the common law, at least on any large or comprehensive scale, not only impracticable, but inexpedient. But as to the practicability and expediency of the other branches of work, those branches which are more directly concerned with statute law, there was not, and is not, any substantial difference of opinion.

Then, first, of indexing. Let no one despise, I hope no one does despise, the work of the indexer, drudgery though it is. It often does for us what was done for the world by those obscure but indefatigable grammarians of the latter middle ages of whom one has been immortalised by Robert Browning. Every reader knows that a good index is one of the best labour-saving appliances that can be found. The work of registering and then of indexing the vast tangled mass of English statutes occupied several generations of industrious workers, performing their laborious work under the supervision of successive commissions and committees. And it is to their labour that is due the very complete chronological table and index of the statutes which is now published annually under the direction of our Statute Law Committee. I have said table and index, for the work consists of two parts. The first part is a chronological table of all public general statutes since the beginning of the parliamentary period, showing which have been repealed in whole or in part. The second part is an alphabetical index to the contents of the statute book, arranged according to subjects.

Concurrently with this work of registering and indexing, and to some extent by the same staff, has been carried on

the work which I have described as expurgation. This has been effected by a series of Acts known as Statute Law Revision Acts. There have been about thirty-six of these Acts. The first of them was passed in 1861, the latest as recently as 1908, for the work requires to be supplemented as legislation advances. But the most notable of them all, and that which has been taken as a model for subsequent Acts of the same kind, was the Statute Law Revision Act of 1863, which was introduced by Lord Westbury in a remarkable speech reviewing the history of previous attempts for the improvement of the statute law, and explaining the principles on which his measure was founded. "What he proposed," he said, "was that the statute book should be revised and expurgated — weeding away all those enactments that are no longer in force, and arranging and classifying what is left under proper heads, bringing the dispersed statutes together, eliminating jarring and discordant provisions, and thus getting a harmonious whole instead of a chaos of inconsistent and contradictory enactments." He explained that, with this object, the whole of the statute roll from 20 Edw. II down to nearly the end of the eighteenth century had been examined and revised. "The statutes that were weeded out might," he said, "be described as those which are no longer applicable to the modern state of society, enactments which have become wholly obsolete, enactments which have been repealed by obscure or indirect processes, but which until extirpated from the statute book would be constantly the cause of uncertainty. An endeavour had been made to apply a remedy to this state of things. The task was one of great difficulty and delicacy. The reason for every alteration would be found in the schedule given opposite to the description of the enactment to which

it had been applied. This had been done in order that the work might be accomplished with something like that certainty and assurance of safety with which works of the kind ought always to be accompanied. When the statute book had been cleared of superfluous and unnecessary matter by the process which he described, he hoped to prepare a digest of the whole law, both common and statute."

All I need say about this projected digest is that a royal commission was appointed to consider its feasibility and that some specimen digests were prepared, but the specimens were not considered satisfactory, and the project, which was probably too ambitious for its time, was silently dropped. What, however, has been steadily carried on is the more modest work of clearing the statute book by means of statute law revision bills.

The task of preparing these statute law revision bills is, as Lord Westbury observed, one of great delicacy. Its performance, especially in relation to old enactments, requires much knowledge of antiquated law and procedure, much knowledge also of the circumstances of the time when the laws dealt with were passed, and of the objects which the legislature had in view in passing them. I speak with some experience on this subject, because, in conjunction with a friend of mine, I prepared the bills which repealed the enactments superseded by our Judicature Acts in the early seventies, and because I have been responsible for examining and checking the accuracy of several other statute law revision bills.

Under the rules laid down for the guidance of the draftsmen of these measures, specific reasons must be given to justify each separate repeal, and these reasons are stated in a column which is attached to the schedule of repeals during the passage of the measure through Parliament, but

is struck out when it becomes law. The reasons must be specific, and general terms must be avoided. For instance, the term 'obsolete' is avoided, because under English law a statute is not, though under Scottish law it may be, abrogated by disuse. One has to pick one's way very gingerly, because great masses of case law have been built up on the language of particular enactments, and one runs the risk of sapping the foundations of some important legal principle. There are still on our statute book, even in its revised form, pages and pages of enactments — Statutes of Provisors and the like — intended to restrict or destroy the powers of the Pope within our island, enactments which we have been afraid to touch lest we should bring down upon our head the anathemas of ecclesiastical lawyers. The difficulties have been great, the risks have been serious, but the revisers have done their work very carefully and cautiously, and very few slips have been discovered.

The task of expurgating the statute law was followed by the task of editing it in a revised form, omitting all the matter cleared away by repeal. The result of this task is to be found in the edition called the Statutes Revised. Two editions of the English Statutes Revised have been published by the authority of the State. The second consists of twenty octavo volumes, which were first brought down to the end of the year 1878, and have since been brought down to the end of the year 1900, so that the edition covers the period concluded by the end of the last century and the end of Queen Victoria's reign. The question of bringing out another edition, omitting matter repealed or spent since the date of the edition to which I have referred, is at the present moment engaging the attention of the Statute Law Committee, a body about which I shall have to speak

later on. In these editions the statutes or parts of statutes which remain unrepealed are arranged in chronological order. No attempt has been made to digest their contents or to group or arrange them under appropriate heads. The work of revision has therefore not been carried as far as it has been in some of your States.

Our Revised Statutes are not popular reading, nor do they belong to the class of books which, according to the bookseller, no gentleman's library should be without. And a professional lawyer generally prefers to use some edition of the particular statutes with which he is specially concerned. These circumstances may account for the fact that the publication of these revised editions by the British Stationery Office on behalf of the State is not a remunerative enterprise. But as their utility has been questioned, it may be worth while to illustrate by a few facts and figures the amount of cost and labour which they save. "After omission of repealed and expired statutes to a vast amount," wrote Bentham towards the beginning of the last century,[1] "the present price of the last edition of the statutes exceeds the average income of any individual of the labouring classes in England."

The first edition of the Revised Statutes substituted eighteen volumes for one hundred and eighteen.

The second edition contains in five volumes the enactments down to the beginning of Queen Victoria's reign, enactments which occupied seventy-seven volumes of the statutes at large.

There, are, indeed, two classes of persons whose needs the revised edition will not fully meet, and, I may point out, was not specially designed to meet. The judge who has to

[1] Works by Bowring, III, 239.

decide, the counsel who has to advise on, the construction of an obscure enactment frequently finds it necessary to refer to the language of Acts, sections, or words which have been repealed, either as dead law, by statute law revision Acts, or as superseded law, by amending, or consolidating Acts. To the historical student the law of the past is even more important than the law of the present. Both these classes of persons require an edition of the statutes containing everything that has been repealed, either by way of statute law revision or otherwise. But both these classes may derive material assistance from the notes and tables in the revised edition which show the reasons for each repeal or omission. And to the ordinary legislator, official, lawyer, or member of the public, it is an immense advantage to have an edition of the statutes which contains only living law, which is comprised within a reasonable compass, and which can be purchased for a reasonable price. Speaking from my experience as a government draftsman, I can confidently say that the existence of such an edition immensely facilitates his work.

Let me pass from the task of expurgating and revising, to that of consolidating, the statute law. The terms consolidation and codification are sometimes used as synonymous. But I think that there is some advantage in giving them distinct and separate meanings. By consolidation I mean the combination into a single statute of several statutes or parts of statutes dealing with the same subject. By codification I mean the reduction into a systematic form of the whole of the law, statute law or common law, relating to a given subject. Consolidation deals with statute law alone as interpreted and explained by judicial decisions. Codification deals both with common law and with statute

law. In consolidating statute law you have to consider and reproduce, unless you determine to alter, the effect of judicial decisions. You also have to consider the reciprocal bearings of the statute law and of the rules of common law on which it is based, which it presupposes and which it may or may not vary. In codifying common law you have to incorporate rules which have already been reduced to statutory form.

Now about the advantages to be derived from the consolidation of statute law, there can be no question. What is more maddening to the professional lawyer, to the official, and to the ordinary citizen than to have to hunt for your law in a dozen, or it may be a score or more, of different statutes scattered over several volumes, or at the best several parts of some one inconveniently big volume, repeating, repealing, implying, qualifying, referring to each other? What is it that is responsible for the unintelligible form — I am speaking here mainly of English legislation — for the unintelligible form of so many of the bills introduced into our legislature, and especially for the abuses of referential legislation which are such a favourite topic of invective in England? Surely it is the chaotic and fragmentary condition of our statute law which makes an amending Act a new and ugly patch on a complicated piece of patchwork. All this is universally admitted, and that is why we are all for consolidation — in the abstract. What many people are apt to overlook is the difficulty involved in the performance of that task. The tasks of expurgation and revision, to which I have referred, are difficult enough; but the work of consolidation is still more difficult. As I have said before, the work required is not mechanical, and involves far more than the use of paste and scissors. Consider, for instance,

the difficulties arising from the differences of language between statutes of different dates. Our statute law extends over seven centuries of the national life, and every statute speaks with the language and bears the colour of its time. What would be the literary effect of placing in immediate juxtaposition sentences or fragments of sentences from Wyclif, Sir Thomas More, Bacon, Johnson, Macaulay? Or conceive a line of soldiers consisting of the Black Prince's long-bowmen, Cromwell's buff-coated troops, the grenadier of the "March to Finchley," and Mr. Thomas Atkins, marching shoulder to shoulder. Such a literary jumble, such a motley and ill-assorted array, would be produced by a congeries of extracts from Plantagenet, Tudor, Georgian, and Victorian statutes. Your statute books do not go back so far as ours, and you have not much to do with Plantagenet and Tudor statutes. But I have quite recently been supervising an attempt to consolidate the Acts of Parliament which relate to the government of India, Acts which run back to the reign of George III, when your great republic was being shaped, and I have found great difficulty in modernizing the language and adapting to modern conditions, enactments which date from the time of Pitt and Fox, of Warren Hastings, and of the old East India Company.

I speak of adaptations to modern conditions, because, apart from considerations of language, every statute is framed with reference to, and presupposes the existence of, the law, the judicial and administrative institutions, and the social conditions of its time. The consolidator cannot afford to overlook the subtle and elusive effects produced on the operation of a statute by changes in the rules of substantive law, in rules of procedure, or in social conditions.

Even when enactments relating to the same subject-matter belong approximately to the same period, they are not unfrequently drawn in different styles; and employ, intentionally or deliberately, different phrases to express the same thing; and differences of this kind must be removed if ambiguity and inconsistency are to be avoided.

Lastly, the comparison and recasting of different enactments are certain to bring to the surface obscurities and inconsistencies, some of which may have been made the subject of judicial or other comment, while others may have lurked unseen. It is difficult to justify the retention or stereotyping of these defects, and at the same time it is difficult to remove them without incurring the charge of altering, while professing to reproduce, the law.

The upshot is that the work of consolidation requires intimate acquaintance with past as well as with existing laws and institutions; involves the rewriting, and not merely the placing together, of laws; the substitution of modern for antiquated language and machinery, the harmonising of inconsistent enactments, and yet the performance of this work in such a way as to effect the minimum of change in expressions which have been made the subject of judicial decisions and on which a long course of practice has been based. The performance of such a task with the degree of accuracy properly required by Parliament requires minute examination and careful deliberation, and imposes a heavy burden, not merely on the draftsman, but on numerous members of the official administrative staff.

Apart from the difficulty of preparing consolidation bills, there is great difficulty in getting them through Parliament. Statute law reform is one of those things which every one praises in the abstract, but about which, in its concrete from,

no one is enthusiastic. No minister expects to obtain credit from passing a measure of consolidation. Such measures are not eagerly demanded by the constituencies, and do not figure as items in any political programme. The permanent official, to whom a minister looks for advice, is often reluctant to alter the form of Acts with which he is familiar, and knows that the preparation of a consolidation bill may severely tax the time of himself and his subordinates. Hence a minister is naturally unwilling to introduce such a measure except on an assurance that it will pass unopposed, and will not encroach on the scanty time available for proposals looming more largely in the public eye. And such an assurance cannot always be obtained. It is difficult to disabuse the average member of Parliament of the notion that the introduction of a consolidation bill affords a suitable opportunity for proposing amendments, to satisfy him that re-enactment does not mean approval or perpetuation of the existing law, or to convince him that attempts to combine substantial amendment with consolidation almost inevitably spell failure in both.

At the end of the last century, when I was writing the book from which I have reproduced some passages here, I was disposed to take a rather despondent view of the prospects of further progress in the consolidation of English statute law. A great deal of very useful work had been done by successive generations of patient and laborious draftsmen at the instance, by the help, and under the encouragement of Lord Chancellors and other eminent lawyers, and with the acquiescence of the legislature. But parliamentary difficulties had increased, and the work, which ought to be always steadily continued, appeared to have come temporarily to a standstill. Since then the prospects have

brightened. It is true that during the last six or seven years the time of that overworked official, the parliamentary counsel to the Treasury or government draftsman, has been fully occupied and more than occupied by current legislation, and he has had no leisure to devote to the preparation or supervision of legislative measures not arising out of immediate political necessities. But, on the other hand, the House of Commons has recently shown itself more inclined to appreciate the importance of this class of legislation and to welcome and to facilitate the passing of consolidation bills, whether in combination with, in anticipation of, or as a consequence of, substantial amendment of the law. For instance, it was found possible in 1910 to pass, by general agreement, an Act consolidating the enactments which relate to the licensing of the sale of intoxicating liquor, a notoriously thorny and controversial subject. Still more recently, our Perjury Act of 1912 and Forgery Act of 1913 have effected an enormous simplification of an important branch of our statutory criminal law. The Perjury Act, which consists of 19 sections, supersedes and repeals enactments contained in no less than 132 different Acts of Parliament.

I ought to say that other parts of the British dominions appear to have shown themselves more alive to the importance of consolidating their statute law than the mother country. Reports from the self-governing dominions and from the Crown colonies show that their legislatures have in recent years passed a large number of useful consolidation Acts.

I have spoken about the processes which have been applied to English statute law for the purpose of making it more intelligible, and of thereby, among other things, facilitating the work of the legislature and the draftsman;

the four processes of indexing, expurgation, revision, and consolidation. Let me now say something about the agencies by which these processes have been carried out. The chief motive power has been supplied by the eminent lawyers, Lord Chancellors and others, who have from time to time taken interest in the work, and the execution has depended largely on the good-will of Parliament. But there are two permanent agencies which have given constant and useful aid, and have done what they can to see that the work is systematically and continuously carried on. One of them is the Statute Law Committee, which was first appointed in 1868 by Lord Cairns, when Lord Chancellor, to make the necessary arrangements for the first revised edition of the statutes and to superintend the execution of the work. This body has been continued ever since by new appointments, and its function is to superintend the work of statute law revision, and the publication and indexing both of the statutes, and also of the great mass of subordinate legislation which consists of statutory rules and orders, and to look after sundry other matters connected with the form of the statute law. The committee has in its time included some very eminent men, such as our late Ambassador to your country, Mr. James Bryce, who always used to take great interest in its work down to the time when he came over here. The members of the committee are appointed by the Lord Chancellor. They are unpaid, and employ as their secretary an officer of the House of Lords. For payment of the staff who work for them or under their supervision, they get grants of money from the Treasury, but the amounts which they require vary according to the amount of work which happens to be going on at the time. For the current financial year they have only asked for the moderate sum

of £513, about $2500. The committee act as advisers to the Lord Chancellor in the matters to which I have referred, and he is their official mouthpiece in the House of Lords.

The other agency is the office of the parliamentary counsel to the Treasury or government draftsman, about which I shall have a good deal to say later on, because it is the office by which in England all the government legislation is put into shape. For the present it must suffice to say that the parliamentary counsel has always been a member of the Statute Law Committee, and the consolidation work recommended by it, and to some extent the indexing of the statute law and the preparation of the statute law revision bills, have been done by draftsmen working under his instructions. In fact, the task of indexing, expurgating, and rearranging the statute law practically constituted a second charge on the time of his office, and occupied all the time that could be spared from attending to current legislation, and advising on questions connected with that legislation. During recent years his time has been fully occupied and more than fully occupied — for he has been terribly overworked — by the work of current legislation, and he has had no time to spare for anything outside that work.

III

THE COMPARATIVE STUDY OF LEGISLATION[1]

I OBSERVE that in the papers which have been kindly supplied to me by Mr. Putnam and Mr. Parkinson about bill drafting and legislative reference bureaus, a great deal has been said, and rightly said, about the importance of the legislator being supplied with information, not only about the statute law of his own country or his own state, but also about the condition of the law and the course of legislation on the subject with which he deals in neighbouring states and in other countries. It is natural that the need of this information should be specially felt in this great country where you have so many State Legislatures, all dealing concurrently with similar legislative problems. The need is felt very strongly in my own country also, and indeed by all European legislatures, and therefore I think it would interest you if I were to say something about the agencies which are available in England to supply this need, and the steps which have been taken to meet it. In one of these agencies I am personally very much interested, because I was to some extent responsible for its establishment. I am referring to the English Society of Comparative Legislation. The institution of this society arose out of a paper which I read in November, 1894, and in which I directed attention to the difficulty then experienced in obtaining satisfactory information about the course of legislation in other parts of the British

[1] This chapter was intended to form part of the lecture reproduced in the preceding chapter, but was omitted for lack of time.

dominions and in foreign countries, and made some suggestions as to the expediency of taking steps towards devising and organising provision for better information on this important subject. The paper attracted a good deal of favourable attention, and at a meeting which was held in the following month, and at which were present some very distinguished and influential persons, — great lawyers, great administrators, agents-general, ambassadors, and other representatives of foreign countries, — a resolution was passed affirming the expediency of establishing a Society of Comparative Legislation, with the object of promoting knowledge of the course of legislation in different countries, more particularly in the several parts of the British dominions and in the United States. The resolution was proposed by Lord Herschell, then Lord Chancellor, and was seconded by Sir Robert Herbert, one of our most eminent colonial administrators. This resolution was the origin of the Society of Comparative Legislation. It has continued ever since and has, I venture to think, done some very useful and important work. Lord Herschell was the first president, and his office is now held by Lord Rosebery. I have the honour of being the chairman of its executive committee. The society publishes a journal, of which the chief editor is Sir John Macdonell, Professor of Comparative Law in the University of London, and a very high authority on questions of international law. The society has, as I have said, done in the past, and is continuing to do, much useful work. But the difficulties with which it has had to contend are very serious, and I mention them because it is probable that similar difficulties would beset the work of similar agencies over here. Our scope is extensive and ambitious, the work which we have undertaken is laborious, and it is carried on by

zealous men, who do the work for the love of it, and whose services are unpaid, for our financial means are wholly inadequate for the purpose of carrying out our objects in the manner in which and to the extent we should wish to see them carried out. We have received, and we continue to receive, most valuable assistance in the way of encouragement and co-operation, from some of our government departments, such as the Colonial Office and the India Office, and from Indian and Colonial governments. And we get some pecuniary contributions from these departments and governments, and from some private individuals and societies who are interested in our work. But we depend almost entirely on unpaid voluntary exertions. We have no endowments, and we have no wealthy individuals at our back. Still we have existed and worked for nearly twenty years, and we hope and believe that we shall be able to carry on our work. Let me give you two illustrations of the work which the society has done.

One of the first things that was proposed was to obtain, through a committee formed for the purpose, and by means of communications addressed to the governments of the several British possessions in different parts of the world, information about the existing conditions of their statute law, with special reference to such points as its form, the modes of preparing and passing bills, the revision and amendment of statutes, the form and manner of their publication, the measures taken to secure uniformity of language, consolidation, codification and indexing. The society undertook this work, sent to the governments of the different parts of the British dominions a number of questions which I am afraid must have given them a great deal of trouble to answer, but which they were most kind and helpful in an-

swering; and by these means collected a great quantity of useful information, which was published in the journal of the society, and of which I took advantage subsequently in a book of my own.

A list of the questions which were sent out, may interest you, because they are questions of the same kind as those which, I understand, are now engaging the attention of a good many persons and associations in this country. The list is as follows:—

I. *Common Law as the Basis of Statute Law*

1. What is the common law of the colony? Under what circumstances, and by whose authority, was it introduced?

2. Is there any law applying exclusively to particular races or creeds?

II. *Statute Law*

1. Of what does the statutory or enacted law of the colony consist? To what extent is it embodied in charters, regulations, orders in Council, ordinances, or Acts?

2. To what extent do the statutes of the United Kingdom operate in the colony by virtue of either:—

(*a*) Original extension of English law to the colony;

(*b*) Express provisions of any order in Council or charter; or

(*c*) Express adoption by the legislature of the colony?

3. Is the statute law of any other colony in force in the colony? (This may happen where one colony has been severed from another.)

4. Is any code or other body of enacted law of non-British origin in force in the colony?

III. *Methods of Legislation*

1. By whom are drafts of legislative measures prepared? Is there any official draftsman? If so, by whom is he appointed, to whom is he responsible, and what are his staff and duties? Do his duties extend to measures introduced by private or non-official members of the legislative body?

2. What is the constitution of the legislative chamber or chambers through which measures have to pass? (A reference to statute law, or charter, or order in Council, or to any recognised textbook will suffice.) If there are two chambers, may measures be introduced into either?

3. Are draft measures published before introduction, or before any other stage? If so, under what rules?

4. Through what stages does a measure pass before it becomes law?

5. Is any opportunity afforded for referring measures, while in course of passage through the legislature, to any special officer or committee on points of form?

6. Have any steps been taken to secure uniformity of language, style, or arrangement of statutes either by means of a measure corresponding to 'Brougham's' Act (13 & 14 Vict. c. 21) or to the Interpretation Act, 1889 (52 & 53 Vict. c. 63) or by official instructions or otherwise?

7. Is there an annual session of the legislature? Are there any fixed or customary periods of session?

8. How are the Acts or ordinances of the colony numbered or distinguished? Are they numbered by reference to the calendar, or to the regnal year, or in any other way? Is it the practice to confer for convenience of citation a 'short title' on each Act or ordinance? How long has this practice been followed?

9. Are private bills (if any) treated separately, and under different conditions from public bills? On what principle is the line drawn between public and private bills? Are private Acts or Ordinances separately numbered?

10. Does any practice exist of accompanying a measure on its introduction by an explanatory memorandum?

IV. *Publication of Statutes*

1. In what manner and under what authority are statutes promulgated? What evidence is accepted of a statute having been duly passed?

2. In what form or forms, and under what authority, are statutes printed for publication?

3. Are the statutes of each session published in a collected form at the end of the session?

4. Are the periodical volumes of statutes accompanied by (*a*) an index and table of contents, (*b*) a table showing the effect on previous legislation?

5. What collective editions (if any) of the statute law of the colony have been published, and whether by the government or by private enterprise? Are these or any of them periodical? Do such editions comprise those Acts of the United Kingdom in force in the colony?

6. Is there any edition of 'Selected Statutes' corresponding to Chitty's 'Statutes of Public Utility'?

7. How are private Acts published?

V. *Revision of Statutes*

1. Have any steps been taken for the revision and expurgation of the statute law, whether periodically or otherwise? What machinery, if any, exists for this purpose?

2. Is there any edition of 'Revised Statutes' showing those actually in force? If so, under what authority is it prepared and published, and what is the date of the latest edition? Is it published at periodical intervals, or how otherwise? Are the contents arranged alphabetically, chronologically, or on any other principle?

VI. *Indexing of Statute Law*

Is there any general index to the statutes of the colony? If so, on what principle is it arranged, and after what interval is it revised? Does it include both public and private Acts or ordinances, and the statutes of the United Kingdom which are in force in the colony? Is it accompanied by any tables showing how each statute has been dealt with? What is the date of the latest edition?

VII. *Consolidation and Codification*

1. What steps have been taken to consolidate the whole or particular parts of the statute law, or to codify any branches of the law?

2. Does any machinery exist for this purpose? Is the work now in progress?

3. What 'codes' are now in force in the colony? When and by whom were they prepared, and on what materials were they based?

VIII. *Subordinate Legislation*

What official or other machinery exists for the preparation, passing, or promulgation of measures of subordinate legislation, such as rules or orders made by the governor, or a minister or department under the express authority of statute or ordinance? Is there any, and what collection of, or index to, such subordinate measures?

Another thing which the society proposed to do was to give some account of the course of legislation throughout the British empire, and so far as possible in foreign countries. "A difficult and ambitious task," you will say. Yes; both ambitious and difficult; but, thanks to the help of friends in different parts of the world and to the zeal and indefatigable labours of the editors of the society's *Journal*, and of the colleagues whom they have called to their assistance, it has been accomplished. For every year since 1895 the society has brought out in its *Journal* a summary of current legislation, published as soon as possible after sufficient time had elapsed for collecting, tabulating, digesting, and summarising our materials. A beginning was made with the work of the several British legislatures, some sixty in number, and the survey has been extended to the United States, where there are some fifty or more legislatures, and also to the continent of Europe. But of course, in dealing with foreign countries, it has, for reasons which will be obvious, been found impossible to make the review as regular, systematic, or complete as in dealing with legislation of the British empire.

The summaries of British legislation for the decennial period 1898–1907 will be found collected in a useful work of four volumes entitled *The Legislation of the Empire.*

I doubt whether any one who has not attempted the task can realise the enormous labour involved in collecting and digesting the great mass of legislative material with which we have had to grapple. I can speak with some experience, for I have myself summarised for each year the Indian Acts, with the subject-matter of which I happen to have greater familiarity than most persons in England.

What the society desired to do was, not merely to compile a dry list or register of enactments, but to bring out the features of novelty, importance, and general interest in each new law. But in order to do this properly, one ought to have some acquaintance with the previous state of the law and the history of legislation, and with the influences, interests, arguments, and currents of opinion which have been brought to bear on the subject-matter of legislation. And the facts ought to be presented in such a way as not to give rise to charges of partiality, prejudice, or captious criticism. In short, the society wanted an army of competent and impartial experts, marshalled and controlled by exceptionally able editors. Of course the society has not realised, and did not expect to realise, its ideals; but it has done what it could with the persons and materials at its disposal, and I believe that it has succeeded in doing a piece of work which experience has proved to be of great practical value, which has been much appreciated throughout the British empire, and which has reflected the greatest credit on the zeal, energy, and industry of the editors of the *Journal* and their staff.

Judging from the experience which we have obtained, we

have no reason to suppose that the interest which was shown in our work at the commencement has in any way abated. On the contrary, we have every reason to believe that it has increased and is likely to increase. Sitting as I do, at the table of the House of Commons at Westminster, I have some means of forming a judgement on this point. I have said that the society arose from a recognition of the need of better information about the course of legislation in different parts of the world. Does that need continue? Is it still felt? To these questions there can be but one answer. Everyone who has had anything to do with the British House of Commons must have been struck with the steady, continuous, growing demand for information of this kind. It reveals itself in the debates of the House, in questions to ministers and in requests for returns — questions and requests which throw an enormous burden on the departments of the executive government. Take some of the most prominent subjects of the day — licensing, education, the care of children, the treatment of old age. The British government is overwhelmed with requests for information about the laws which are in force or have been proposed on these subjects in the different parts of the British dominions and in other parts of the world.

These requests come not merely from Westminster, but from other parts of the British empire, and from foreign countries; and the supply of answers to them occupies a great and increasing part of the time of the several departments of the government. I feel sure that any aid which they could obtain in the performance of this onerous task would receive a most hearty welcome. Our society has therefore every encouragement on this ground to continue its work, and to extend it so far as means will suffice.

For instance, the annual summaries supply useful information about the course of legislation, but they supply only a small part of the information which is desirable. One wants to know, not merely what laws have been passed, but how they work, and, in some cases, whether they work at all. We should like to supplement our necessarily meagre annual reviews of legislation by monographs on particular subjects of legislation, showing the laws in force in different countries on the same subject, and how they respectively work in practice. Some valuable monographs of this kind will be found in the volumes of our *Journal*, and we should like to extend their number largely. But I need hardly remind you how difficult work of this kind is, if it is to be well done, and what an amount of labour and of expert knowledge it involves.

If we were in a position to extend our efforts in this and other ways, we might, as I sometimes dream, establish and maintain something which would be the recognised organ of those who are engaged in the study either of comparative law or of comparative legislation, playing the same kind of part as is played for the students of history by such organs as the *English Historical Review* and by similar organs in other countries. Such an organ should contain articles by competent writers on special subjects, and should also put its readers on the track of information to be derived from other sources, such as authoritative treatises, blue books, periodicals, and special articles in newspapers, whose correspondents often supply us in England with extremely valuable information about the nature and working of legislation in different parts of the British empire and in foreign countries. It appears to me that there is need for such an organ as this, and ample room for it beside the existing

organs devoted to legal subjects. This would be the ideal at which I should aim. But to make even an approximation to its attainment would involve much expense, much labour, and careful organisation.

I have spoken to you at some length about the work carried on by the English Society of Comparative Legislation, because I know that similar work is being carried on by similar organisations in this country. Now work of this kind depends entirely on the co-operation and mutual help of many men and many minds in many different States and countries. We in England, you in the United States, others in different parts of the British dominions and in foreign countries, ought to know all about each other, and about the work in which we are severally engaged, and we ought to help each other in what is really an international work, in every possible way, by supplying information, by indicating paths of inquiry which may be usefully pursued, by subscribing to each other's journals or other organs; indeed, by every available form of co-operation, for it is by co-operation alone that we can apply and economize our labours.

I should like to conclude this branch of my subject by saying a very few words suggested by the summaries of current legislation to which I have referred. Any one who glances through these summaries and is able to detach his mind from their arid details and concentrate it on their general features cannot fail to be struck with one thing. He will observe that we, the great civilised nations of the world, are all busily engaged, under different conditions and by different methods, in pursuing objects which are similar and often identical. We are all attempting, with imperfect vision and with stumbling steps, to advance, so far as it can be advanced by legislation and administration, the cause of

humanity and civilisation, to make our laws more intelligible and more rational, to make better provision for those who are unable to help themselves. We have all much to learn from each other, from our experiments, from our failures, from our successes. That is one lesson to be derived from this survey of legislation. There is another. The more we know about each other, the more, especially, that we direct our attention to those aims and objects which unite instead of dividing mankind, the more we endeavour to understand, appreciate, and sympathise with the common work in which we are all engaged, the less we are likely to be influenced by those suspicions and prejudices, bred of ignorance, which are the most fertile causes of discord and of war. The knowledge which it is the object of this English society of ours and of similar societies elsewhere to provide and to organise is knowledge which makes for progress, and makes for peace.

IV

ORIGIN AND FUNCTIONS OF THE PARLIAMENTARY COUNSEL'S OFFICE IN ENGLAND

WHAT efforts have been made in England to improve the form of current legislation, and how far have those efforts been successful? This was the second of the questions which I asked you to consider, and, to answer it, I must again make a short excursion into history.

How and by whom parliamentary bills, bills intended to become Acts of Parliament, were framed before a quite recent period is a subject which is involved in much obscurity.

In the earliest period of parliamentary history, statutes or Acts of Parliament were orders made by the King on petitions presented by or through Parliament. It was for the King to say, after taking the advice of the wise men about him, whether any order was to be made on such a petition, and, if any order was to be made, how it should be carried out.

It must be remembered that the medieval Parliament was an expansion of the King's Council, and this fact explains the nature of the business which it had to transact.

The immediate cause of summoning a Parliament was usually want of money. The King had incurred, or was about to incur, expenses which he could not meet out of his ordinary resources, such as the revenues of his domain and the usual feudal dues. He summoned a Parliament and, through his chancellor or some other minister, explained what he wanted and why he wanted it. The King's speech

might touch on other great matters, about which he might need advice or approval, but money was the gist. On the other hand, the King's subjects had grievances for which they desired redress. The grievances would be of different kinds, breach of old customs, failure to observe charters or laws, oppression by the King's officers or by great men, maladministration of justice, difficulties in the way of settling private disputes, and so forth. For the redress of these grievances petitions were presented, petitions which in their multifarious character were not unlike the statements of grievances presented to the national assembly, on the eve of the French Revolution. The petitions were to the King in Parliament or to the King in his Council, and Parliament was the petitioning body, the body by or through whom the petitions were presented. The remedies required would be classified in modern language as judicial, legislative, or administrative. But in the thirteenth century these distinctions had not been clearly drawn. I cannot find a better illustration of the way in which judicial, administrative, and legislative remedies were then continued than in a statute made by Edward I in his Parliament of 1292, known as the Statute of Waste, and based on a petition presented to him in that Parliament. The statute begins with a long story showing how Gawin Butler brought a complaint before the King's justices about waste done to his land, but died before obtaining judgement; how his brother and heir, William, who was under age and a ward of the King, sought to continue the proceedings; and how the justices differed in opinion as to whether he was entitled to do so. Thereupon the King, in his full Parliament by his common council or by general consent (for the Latin phrase wavers between the two meanings of "council" and "counsel"), ordains that all heirs may have

an action by writ of waste for waste done in the time of their ancestors, and the King himself commands his justices to give judgement accordingly. Here the King acts partly in his legislative capacity, laying down a general rule, partly in his judicial capacity, as having power to review and control the proceedings of his justices, and partly in an administrative capacity as guardian of an infant heir.

Now the responsibility for framing these statutes would naturally devolve on the King's judges or on other high officials belonging to, or called in to assist, his Council. But when legislation on petition was superseded by legislation by bill, when Parliament no longer merely asked for a law but dictated the terms in which it was to be framed, the procedure for framing it would naturally alter, and doubtless some alterations took place. In Tudor times the King played a much greater part in the initiation of legislation than had been played by his Lancastrian predecessors, and Henry VIII, in particular, took a keen, active, and personal interest in the legislation of his Parliaments. Indeed, Froude goes so far as to tell us that Henry not only dictated but drafted his own laws, and refers to a particular Act as the composition of Henry himself and the most finished which he has left to us. But I have been unable to find satisfactory authority for this characteristically bold statement.

It seems probable, though I have not investigated the subject carefully, that the most important Acts of the Tudor period were framed by committees of the Privy Council, such as the committee which was appointed in 1583 "to consider what laws shall be established in this Parliament, and to name men that shall make the books thereof."

In the period after the Restoration, the judges, who at that time assisted the House of Lords, not only in their

judicial but in their legislative business, and habitually attended the sittings of the House for that purpose, appear to have been occasionally employed by the House as draftsmen of bills or clauses. Sometimes the heads of a bill were agreed to by the House, and a direction was given either to the judges generally or to particular judges, to prepare a bill. In other cases a judge would attend a grand committee of the House as a kind of assessor, and do such drafting work as was required. It is not clear how long this practice continued, but there is an interesting reference to it in a speech delivered by Lord Hardwicke in the House of Lords on the Militia Bill in 1756,[1] and I will venture to quote a passage from his speech because it illustrates the practice of his time, and gives the views of a great English eighteenth century judge as to the way in which statutes ought to be framed.

"In old times," he said, "almost all the laws which were designed to be public Acts, and to continue as the standing laws of this Kingdom, were first moved for, drawn up, and passed in this House, where we have the learned judges always attending, and ready to give us their advice and assistance. From their knowledge and experience they must be allowed to be best able to tell whether any grievance complained of proceeds from the non-execution of the laws in being, and whether it be of such a nature as may be redressed by a new law. In the former case, a new law must be always unnecessary, and in the latter it must be ridiculous. And when by the opinion and advice of the judges we find that neither of these is the case, we have their assistance whereby we are enabled to draw up a new law in such a manner as to render it effectual and easy to understand. This is the true reason why in former times we had very few laws passed in Parliament, and very seldom, if any, a posterior law explaining and amending a former."

There might be some difficulty in identifying the golden age of legislation to which Lord Hardwicke thus refers,

[1] Harris, *Life of Lord Hardwicke*, III, 58.

but the practice which he commends appears to have been continued at intervals until at least the middle of the eighteenth century. It is to be hoped, in the interests of judicial reputation, that our eighteenth century judges were not responsible for the form of much of the copious and ill-expressed English legislation of that century.

Some Acts dealing with specially legal topics appear, as might be expected, to have been drawn by eminent lawyers. Thus the Statute of Distributions is said to have been 'penned' by a distinguished civilian, Sir Leoline Jenkins, and, at a much later date, the Fines and Recoveries Act and other Acts arising out of the recommendation of the Real Property Law Commissions are known to have been drawn by the great conveyancer Mr. Brodie. Many other statutes bear intrinsic evidence of having been the work of conveyancers.

As to the mode in which the legislation of the eighteenth century was prepared, there is little evidence available. Much of it was the work of private members. Administrative measures introduced by a minister of the Crown may presumably have been drawn by some member of his official staff, or by some legal expert attached to, or working for, his department.

Towards the close of the century William Pitt appears to have made some more definite and permanent arrangements for the preparation of measures for which he was responsible.

I once found in an old blue book some evidence given in 1833 before a select committee of the House of Commons by one William Harrison. Mr. Harrison said that some time before the French Revolution, when he was a special pleader, he was asked to assist in preparing some measures

which William Pitt then had in contemplation, that since that time he had done a great deal in the way of drafting government measures, and that at the time when he spoke, that is to say, in 1833, he held the office of parliamentary counsel to the Treasury, and in that capacity was expected to draw bills, not only for the Treasury, but for other government departments.

Very little appears to have been remembered about Mr. Harrison or his work, and my impression is that in giving his evidence he exaggerated the duties and importance of his work. The Acts which he said he drew are not masterpieces of draftsmanship. But his evidence is of interest for two reasons: first, because he bore a title which was subsequently revived; and, secondly, — and this is far more important, — because the evidence illustrates the dawn or germ of government responsibility for parliamentary legislation.

It must be borne in mind that in England the share of the executive government in the work of current legislation and their reponsibility for it has enormously increased during recent years, that is to say, since 1832. Many measures which at the present day could not be carried except as government measures were, in the eighteenth century, and in the early part of the nineteenth century, introduced and carried by private members. Thus, in the history of poor law legislation, the important statutes known as "Gilbert's Act" and "Hobhouse's Act" were private members' Acts. Sir Charles Wood, talking to Mr. Nassau Senior about the year 1855, is reported to have said: —

> When I was first in Parliament, twenty-seven years ago [in 1825] the functions of the government were chiefly executive. Changes in our laws were proposed by independent members, and

carried, not as party questions, by their combined action on both sides. Now, when an independent member brings forward a subject it is not to propose a measure himself, but to call to it the attention of the government. All the House joins in declaring that the present state of the law is abominable, and in requiring the government to provide a remedy. As soon as the government has obeyed, and prepared one, they all oppose it. Our defects as legislators, which is *not* our business, damage us as administrators, which *is* our business.

That is the language of a veteran statesman who remembered the old system and had lived well into the new system. I call it the new system, for you must always remember that the Reform Act of 1832 is one of the great landmarks of English constitutional history, and that what we are apt to call the eighteenth century system lasted more than thirty years beyond the end of that century. And the most striking feature of the change from the old system to the new was the extension of the responsibility of the central government in the sphere of administration and still more in the sphere of legislation.

The change which came over the functions and responsibilities of the executive government in England during the years that followed the passing of the Reform Act of 1832 was reflected in the alterations which were made in the machinery for drafting and preparing government bills. The Mr. Harrison to whom I referred, and who gave evidence in 1833, seems to have gone on drawing bills till 1837, when his office was allowed to fall into abeyance. At that time, the first year of Queen Victoria's reign, it was the Home Secretary who was usually responsible for initiating the most important legislative measures of the government, and the Home Secretary soon felt the need of more regular and systematic aid in the preparation of bills. And so it came to

pass that in the year 1837 the Home Secretary of the day appointed a barrister, Mr. Drinkwater Bethune, to a post in which he was charged with the duty of preparing bills for parliament under the direction of the Home Secretary. Mr. Bethune subsequently went out to India as member of the Governor-general's Council, and was succeeded in his post at the Home Office by Mr. Walter Coulson, a man of great ability and very well known in his time, though now, I fear, forgotten. He had been in his youth an amanuensis to Jeremy Bentham, was a friend of Charles Lamb and Leigh Hunt, and became a very successful newspaper editor before he abandoned journalism for the legal profession and was called to the bar. Mr. Coulson died in 1860 and was in that year succeeded in his post by Mr. Henry Thring, who was afterwards raised to the peerage as Lord Thring, and who, as some of you probably know, acquired great fame as a parliamentary draftsman. Mr. Thring, as he then was, appears to have drawn, as Home Office counsel, all the most important of the bills which were introduced into parliament on the responsibility of the cabinet. His services were often placed at the disposal of other departments of the government. But these departments were not bound to employ him, and they often preferred to employ independent counsel to draw their bills, or to get them drawn by their own departmental officers without legal aid. Now, the result of this system, or lack of system, was very unsatisfactory. The cost was great; for barristers employed by the job were entitled to charge fees on the scale customary in private parliamentary practice. There was no security for uniformity of language, style, or arrangement in laws which were intended to find their place in a common statute book. There was no security for uniformity of principle

in measures for which the government was collectively responsible. Different departments introduced inconsistent bills, and there was no adequate provision by which the prime minister, or the cabinet as a whole, could exercise effective control over measures fathered by individual ministers. And, lastly, there was no check on the financial consequences of legislation. There was nothing to prevent any minister from introducing a bill which would impose a heavy charge on the Treasury, and upset the chancellor of the exchequer's budget for the year.

These were the defects that impressed the acute and frugal mind of Robert Lowe (afterwards Lord Sherbrook) when he was chancellor of the exchequer in 1869. The remedy which he devised was the establishment of an office which should be responsible for the preparation of all government bills, and which should be subordinate to the Treasury, and thus be brought into immediate relation, not only with the chancellor of the exchequer, who was specially interested in the financial aspects of legislation, but also with the first lord of the Treasury, who was usually prime minister. That is how the present office of parliamentary counsel to the Treasury was started. Its establishment involved no legislation, merely a Treasury minute, and an application to the House of Commons to vote the necessary money. Mr. Thring was made head of the office, with the title, revived for that purpose, of parliamentary counsel to the Treasury, and he was given permanent assistance and a Treasury allowance for office expenses and for such outside legal assistance as he might require. He selected as his assistant a young barrister, Mr. Jenkyns, who afterwards succeeded him, and there is no indiscretion in my saying that this Sir Henry Jenkyns, as he afterwards became,

is the gentleman who was referred to in such eulogistic terms — eulogistic but not a bit beyond his merits — by Mr. Bryce in the statement which he made before a committee of Congress last year.

The constitution of the office, as established in 1869, has remained ever since without any material alteration to the present time. The parliamentary counsel and his assistant are now called the first and second parliamentary counsel, and the status and salaries of the two counsel have been more nearly equalised with each other. The first parliamentary counsel now draws a maximum salary of £2500 (say $12,500), the junior a maximum salary of £2000 (say $10,000), but that is about all the change that has been made. The permanent staff consists of the two counsel, with three shorthand-writing clerks, an office keeper, and a boy messenger or office boy, and these together run what may be called the legislative workshop. Two barristers usually attend the office regularly as assistants of the two parliamentary counsel. But their attendance is voluntary; they are under no permanent engagement; they are paid by fees in accordance with the work done by them; they have their own chambers, and are allowed to take outside work. Such other legal assistance as is required is given by barristers practising at Lincoln's Inn or the Temple. The estimate, or, as you would call it, the appropriation, for the parliamentary counsel's office, for the current year, 1913–1914, was £5596, with an additional £2100 for barristers assisting the parliamentary counsel and £10 for minor expenses, about £7700 (say $38,500) in all.

Now, that being the staff of the office, what is the work that it is supposed to do? Under the minute of 1869 the parliamentary counsel was to settle or draw all such govern-

You will see that the instructions thus given are of a general and indefinite character. They may or may not be accompanied by more specific instructions from the minister or department principally concerned, in the form either of a short note, or of reference to the report of a commission or committee, or of papers showing the circumstances which appear to render legislation expedient. The procedure adopted on receipt of the instructions varies according to the character and importance of the measure. There is usually a preliminary conference either with the minister who is to take charge of the bill, or with the permanent head of his department, or with both. In the case of minor departmental measures, the instructions first received may suffice for the immediate preparation of a draft much in the form in which it will be submitted to Parliament as a bill. In the case of more important and elaborate measures, the stage of gestation is naturally longer. The draftsman often has to prepare memoranda stating the existing law, tracing the history of previous legislative enactments or proposals, or raising the preliminary questions of principle which have to be settled. The first draft which he prepares may take the form of a rough 'sketch' or of 'heads of a bill.' The original draft, whether in the form of a bill or otherwise, is gradually elaborated after repeated conferences with the minister, and with those whom he takes into his confidence.

A measure will often affect more than one of the government departments; and in those cases the departments affected will have to be consulted. The responsibility for seeing that this is done rests, primarily, with the initiating department; but, as a matter of convenience, the necessary communications are often made by the draftsman. In particular, the attention of the Treasury has to be directed to

any legislative proposal involving expenditure of public money; and the parliamentary counsel, as an officer of the Treasury, is charged with responsibility for seeing that this duty is not overlooked. When there is a conflict between the views of different departments on a subject of legislation, the parliamentary counsel, from his neutral position, may often find it possible to suggest a mode of harmonising them. And his general responsibility for all government bills enables him to guard against the risk of one department bringing forward proposals inconsistent with those brought forward by another.

When the draft of a bill has been finally or approximately settled, it is usually circulated to all the members of the cabinet for their information before introduction into Parliament; and the parliamentary counsel supplies the executive department concerned with a sufficient number of copies for this circulation.

So long as a bill remains in the form of a draft, it can be altered and reprinted as often as convenience requires, and the parliamentary counsel employs the services of the King's printers for this purpose. But as soon as a bill has been introduced into either House of Parliament and printed by order of that House, it passes out of his control. It can then only be altered by the authority of the House, and copies of the bill, in its original or its amended form, can only be supplied in the same way as other parliamentary documents.

V

DUTIES OF A GOVERNMENT DRAFTSMAN

You will see from what I have said that the preliminary labours of the draftsman may, in the case of an important measure, be very considerable. He has to get up his brief as a barrister has to get up his brief before arguing a heavy case, and he has not only to master his brief, but, to a great extent, to collect and put into shape the materials for it. He has to get up his law and to get up his facts, and his labour may involve a good deal of historical research, such as has to be undertaken by a barrister, either personally or through his "devils," before arguing a heavy case, involving, say, questions of ancient property law, or questions on the construction of a series of treaties, or questions on the construction of a series of complicated statutes. For information about the facts constituting the case to be dealt with by legislation, the government draftsman would, in England, naturally rely mainly on the executive department principally concerned. The officers of that department would supply him with the necessary information or tell him where it is to be found, or at least put him on the track of finding it. A good deal of this information would be in the possession of the department itself, but a good deal of it would usually be found in what we call 'blue books.' Most of the important legislation in England is preceded by an official inquiry, and is based, more or less, on the reports and recommendations of some commission or committee. These official inquiries are usually held either by a royal commission, or by a par-

liamentary committee, or by a departmental committee. A royal commission is constituted, and its members are appointed, by the Crown, on the advice of one of the ministers of the Crown, but usually in response to parliamentary pressure for inquiry into a particular subject with a view to legislation, or to executive action. A parliamentary committee is appointed, and its members are selected, by one of the two Houses of Parliament, or there may be a joint committee of the two houses. In any case it consists exclusively of members of Parliament. A departmental committee is appointed by the political head of the government department concerned, and consists of such persons, officials or others, as he may select. Its functions and powers are much the same as those of a royal commission, but it is supposed to be a rather less dignified body. A parliamentary committee can compel the attendance of witnesses and the production of documents, and can examine witnesses on oath. A royal commission or departmental committee does not possess these powers unless they are expressly conferred by a special Act. On the other hand, a parliamentary committee can only sit when the House by which it is appointed is sitting. It comes to an end with the expiration of the session, and must be appointed afresh if its labours are to be renewed in a following session, whilst a royal commission or departmental committee can sit until its labours are concluded. The power to compel attendance and to examine on oath is of less importance than it might seem, for in inquiries before parliamentary committees witnesses are usually willing to attend and supply information, and the administration of an oath is, as a rule, not considered necessary.[1]

[1] As to royal commissions, see the article by Professor Harrison Moore of Melbourne in the *Columbia Law Review* for June, 1913.

The reports of these commissions and committees are made parliamentary papers by being formally presented to one or both Houses of Parliament, and constitute part, but not the whole, of that formidable mass of official literature which is popularly known under the name of blue books, which is so frequently used as an arsenal for arguments in political discussions, and into the bowels of which the legislator, or would-be legislator, and his assistants have so frequently to dig. When I was in the parliamentary counsel's office the indexing of this mass of blue books was not quite satisfactory, and it often took one a good deal of time to find out what one wanted. But it has now been put on a satisfactory basis. There is a collective index to the blue books for each of the two periods 1801 to 1852 and 1853 to 1899, an index for each decennial period, and an index for each session.

I mention these details because in the papers which have been supplied to me there is a great deal about bureaus of legislation or reference bureaus, and I thought you might like to know something about the kind of information bearing on legislative projects which is ordinarily available to the legislator in England. Of course, in our country, as in yours, large amounts of information are supplied by voluntary and unofficial agencies representing persons and bodies interested in the subject about which it is proposed to legislate, and any member, be he a minister or a private member, who introduces or desires to introduce a bill, or to take an active part in supporting or opposing it, is sure to find himself deluged with literature, more or less relevant, and more is less valuable.

of so[illegible] we have not in England any official agency corre-
are usu[illegible] to the legislative reference bureaus which have

been established or are proposed to be established in several of your States. Our view is that information of the kind which these bureaus supply should be supplied mainly — mainly but not wholly — by libraries and librarians. We have several excellent libraries which supply such information. There are libraries attached to the principal departments of the executive government, containing information on the subjects falling specially within the experience of that department. For instance, on labour questions you would find much information in the libraries of the Home Office and the Board of Trade. For information about India or the Colonies you might go to the library of the India Office or of the Colonial Office. The Board of Education has an admirable educational library. And so with other departments. There are also libraries attached to each of the two Houses of Parliament, the House of Lords and the House of Commons, but each of these libraries is accessible only to members or officers of the House to which it belongs. Then there are useful libraries attached to private or semi-private institutions, such as the Inns of Court, the Colonial Institute, and the London School of Economics and Political Science.

The journals of the English Society of Comparative Legislation supply much information about the course of current legislation in different parts of the world. From sources such as these, and with the help of individuals or private organisations specially interested in a particular subject of legislation, a legislator or intending legislator can, in my country, usually obtain a vast amount of information on the subject with which he proposes to deal. In fact, if he is a public man, he runs a serious risk of being 'snowed under' by the pamphlets, memoranda, and other documents which

pour in upon him from various quarters. We have not, however, in London any central library accessible to the public generally, conveniently situated, and specially adapted to the needs of the legislator or administrator. We have nothing on the scale of your admirable Library of Congress at Washington, an institution for which I often envy you.

I should like to say something more about the conferences to which I have referred, conferences which take place before and during the preparation of a bill, and also afterwards during its progress through the legislature, conferences in which the draftsman takes part. I look back on some of these conferences as among the most interesting and instructive experiences of my official life. One might have, if the subject were important, and if the minister were capable and determined to put his back into his subject, and if time were available — it must be admitted that all these conditions were not always present — one might have a big subject thoroughly discussed from many points of view. First there would be the minister himself, who would be apt to look at it, and would be specially qualified to look at it, from the political point of view. He would be in the best position to know from what quarters and on what grounds support might be expected, from what quarters and on what grounds criticism, attack, or opposition was to be feared, what was likely to be the relative strength of his supporters and his opponents, and what means of persuasion and conciliation would be available and useful. Then there would be the permanent head of the department, the government civil servant, who under our system does not change with political changes. His special business would be to look at the proposals from an administrative point of view. Would they work? By what agencies could they be worked? What

would they cost? How was the cost to be met? These, and a thousand other questions of a similar kind, he would have to meet, and he would have to give reasons for his opinions and to fortify his reasons with facts.

Lastly, there would be the draftsman, whose special duty would be to express in appropriate legislative language the conclusions arrived at by the minister in charge of the measure. But, judging from my own experience, he was usually expected to do a good deal more than that. He would, perhaps, at the first stage of all, have got up the history of the subject, and would know what previous attempts at legislation about it had been made, whether and how far they had succeeded, whether and how far they had failed, and if they had failed, why they had failed. He might know something about the course of legislation not only in other times but in other countries, and might have something to say about the lessons to be derived from successes or failures elsewhere. If he was an old hand at the work, a good deal of knowledge about previous legislative attempts, successes, and failures would have fallen within the range of his personal experience. It might have been his duty previously, it might be his duty then, a duty, painful or otherwise, according to his temperament, to prick legislative bubbles, and to damp the ardour of ambitious legislators by asking inconvenient but necessary questions about the precise mode in which those proposals were to be carried into effect. Moreover, as I have said before, he might be able to throw light on the proposals from other points of view, and to guard against conflicts or inconsistencies between the policy or proposals of different branches of the government. Thus it may be his duty to inform, to advise, to criticise, or to suggest. But decision, and responsibility for decision, rest with the

minister and with him alone. The draftsman is merely one of the experts whom the minister calls in to help him. It is not on his shoulders that responsibility falls, except responsibility to the minister whom he serves; it is not with him that the last word remains. Government by experts is not an ideal of which I am enamoured. But government by experts is one thing, government with the aid of experts is another. And in legislation, as in other branches of government, to seek the aid of experts, and to keep them in their proper places, is desirable and wise.

At conferences such as I have described, other experts, official or unofficial, besides the draftsman and the permanent civil servant representing the department concerned, are often called in. And sometimes the draft, if it is of an important character, is referred to the consideration of a cabinet committee, where those who are privileged to attend may occasionally hear a minister and his proposals criticised by his colleagues with a frankness which, to the uninitiated, is surprising.

Such are the duties of the government draftsman before the form of a bill is finally settled, and before the bill is printed and published by order of the House in which it is introduced.

Of course, however, his labours do not end at this stage. The publication of a bill brings suggestions for amendment, which may be forwarded by the minister or department for consideration. After the second reading of the bill these suggestions take the form of amendments on the notice paper, which have to be daily scrutinised. In anticipation of the committee stage, the draftsman often finds it prudent to prepare, for the purpose of refreshing his own memory, and for the use of the minister in charge, notes on the several clauses, explaining the origin and object of the

proposals which they embody, referring to the precedents on which reliance can be placed, and noting the arguments which may be used or which may have to be met. As the committee stage approaches, and when it has been reached, the amendments become the subject of discussion with the minister, and alterations or consequential amendments have to be framed. If the bill goes to a committee of the whole House or to one of the grand committees, the draftsman may be expected to attend the debate, and give such assistance as he can in the way of framing or modifying amendments, or meeting points.

Where a bill is much amended in committee, it requires minute examination after the committee stage, for the purpose of seeing whether there are any errors to be corrected, inconsistencies to be removed, or consequential alterations to be made; and amendments have to be framed for insertion at a later stage. Notes also have to be written on various points; and the literature which thus gathers round a bill often attains to formidable dimensions.

In order to explain these proceedings more fully I ought to touch on some of the differences between legislative procedure in the House of Commons at Westminster, and legislative procedure in Congress at Washington. And in doing so, I will deal only with what are called in England public bills, with which alone the government draftsman deals, and not with private bills, with which he has no concern. In Congress, as I understand, the first and second readings of a bill are merely formal stages, and after second reading the bill is sent by direction of the Speaker to the appropriate committee, that is to say, to that one of the standing committees of Congress that deals with the class of subjects to which the bill relates. This is not the procedure at West-

minster. Under a recent standing order of the House of Commons almost any public bill can be presented to the House, as a bill always could to the House of Lords, without any previous opportunity for debate or division. The only preliminary required is formal notice of intention to present on a particular day. The few exceptions relate to cases where the introduction of a bill has to be preceded by and based upon a preliminary financial resolution. This form of introduction — presentation, followed as a matter of course by first reading — is adopted in the case of the vast majority of public bills. But usually in the case of the more important government bills, and occasionally in the case of private members' bills also, the old procedure is still followed. The member, be he a minister or a private member, moves for leave to introduce the bill, and on that motion debate and division can take place. This procedure enables the introducer of a bill to describe in popular language the nature of his proposals and thus prepare the ground for the study of the bill itself, which is probably expressed in more or less technical language. On the other hand, it invites a discussion which must be incomplete and unsatisfactory, because the text of the bill is not within the knowledge of those who wish to criticise its provisions.

But whatever be the comparative advantages and disadvantages of the procedure — and in the opinion of many the disadvantages predominate — it is a survival from ancient times and retains some quaint features. If the House, on the motion of a member, makes an order giving him leave to introduce a particular bill, the Speaker addresses him and asks him 'Who will prepare and bring in the bill?' He reads out a list of names and then walks down to the bar of the House and is again called by the Speaker. Thereupon he

walks up the floor of the House and hands the bill, or rather a 'dummy' which represents it, to the clerk. These formalities only occupy a few seconds, but they represent in a compressed and symbolical form, proceedings which in the seventeenth century may have occupied days or weeks. In those days, when the House had come to the conclusion that a case for legislation had been made out, some member would undertake, with the help of colleagues whom he would name, to prepare the necessary measure. Thereupon he would go off to the Temple or Lincoln's Inn, or some other convenient place, and, with the help of his friends and advisers, laboriously 'pen' the preamble and clauses of his bill. He might take some time in doing so, and not until the process was finished and the bill was complete in manuscript form would he appear with it at the bar of the House. Now he goes straight from his seat to the bar, and then marches up to the table, carrying with him the "dummy," which contains only the title of the bill, whilst the text of the bill may be still far from its final form and indeed may be non-existent.

Nowadays, whether a member adopts the new or the old form of procedure, whether he presents a bill after notice, or introduces it after having obtained an order giving him leave to do so, he effects the introduction by bringing to the table of the House where the clerks sit, a document which is supposed to be his bill, but which is really a "dummy" or sheet of paper supplied to him at the public bill office, and containing the title of the bill, the member's name, and the names of any other members who wish to appear as supporting him or joining with him in presenting the bill. The clerk at the table reads out the title of the bill, and it is then supposed to have been read a first time. A formal order is made for printing it, and a day is fixed for its second reading. There

was a time when those so-called "readings" were realities. The Speaker would explain from notes or a "breviate" supplied to him the general nature of the proposals to be brought before the House, and the bill itself would probably be read in full, at later stages, by the clerk at the table of the House. Nowadays the "readings" are merely stages in the progress of a bill through the House. The first reading is a mere formality. When the question is put that the bill be read a second time an opportunity is afforded for discussing its general principles as distinguished from its details. If the House signifies its approval of these principles, the bill is supposed to be read a second time, and then follows what is called the committee stage. Under the present rules, when a bill has been read a second time it is sent to one of the standing committees on bills, unless it falls under certain exceptions, or the House makes an order that it be considered by some other kind of committee.

There are four of these standing committees. One of them is for the consideration of public bills relating exclusively to Scotland, and must include all the members representing Scottish constituencies. The other three are constituted by the committee of selection, which is one of the committees appointed for each session by the House, and the same committee of selection also reinforces the committee on Scottish bills by adding to it some other members. The maximum number of each standing committee is eighty. The minimum number is sixty, and the quorum for business is twenty.

If a bill does not go to a standing committee, it usually goes to what is called a committee of the whole House, but is really the House itself, transacting its business in a less formal manner, with the Speaker's chair vacant, and sitting

under the presidency of a chairman, who occupies the chair at the table which is occupied by the clerk of the House when the Speaker is present. These so-called committees of the whole House, corresponding to what are called "Committees of the whole" in the United States, came into existence at the beginning of the seventeenth century. The more important bills were then sent to large committees, and as it was difficult to obtain attendance at these committees, orders were often made that any member who wished might attend. These orders grew into a general practice. It is said also that the House of that day did not place complete confidence in its Speaker, whom it regarded as the agent and nominee of the King, and that it preferred to conduct its deliberations in his absence. So it came to pass that what is called a committee of the whole House is the same body of persons as the House itself, sitting in the same place, with slightly different formalities and procedure.

Before a recent change in the standing order of the House of Commons, all bills went after second reading to a committee of the whole House, unless the House ordered otherwise. Now the presumption is reversed, and all bills, except a special class, go to a standing committee unless the House orders otherwise. But the finance bill and other money bills of the year must go to a committee of the whole House, and opposition is always made when it is proposed to send to a standing committee any of the more important bills or any very controversial bill, for, notwithstanding the recent change of rules, many members hold that every member of the House ought to have an opportunity of taking part in the discussion of the detailed provisions of these bills.

When a bill is before a standing committee or a committee of the whole House, the committee goes through the bill,

clause by clause, discussing any amendments that may be proposed, determining as to each clause, how, if at all, it should be amended, and whether in its original or amended form it should stand part of the bill, and then whether any new clauses should be added. In the case of important and controversial bills these debates may last over many days or weeks, and the notices of amendments to be proposed fill many pages of the parliamentary notice papers. When the discussion is finished and the whole bill has been gone through, the chairman of the committee makes a simple report to the House, merely stating whether the bill has been amended or not.

These legislative sittings of the committee of the whole House and of standing committees are open to the public so far as our limited accommodation permits. The debates in the committee of the whole House are printed and published in the official report. Save in exceptional cases there is no official report of debates in standing committees.

In some cases a bill, instead of going to a standing committee or to a committee of the whole House, is sent to a small select committee or to a joint committee of both Houses. These cases are comparatively rare, and the reason for adopting this course usually is that it is desired to summon witnesses and take evidence as to the expediency and effect of the provisions of the bill. Committees of this kind usually make special reports, stating their reasons and conclusions, but bills considered by them have to be considered subsequently by a committee of the whole House.

After the committee stage follows the report stage. The House, sitting formally, with the Speaker in the chair, considers the bill as reported to it by the committee, and dis-

cusses and determines whether any further alterations or additions should be made. This report stage is in some cases dispensed with, and in other cases may be a mere formality. But sometimes it is a very serious stage, occupying a long time, and there is often a tendency to make it a repetition of the committee stage.

The final stage in the House of Commons is the third reading. At this stage only formal or verbal alterations are allowed. What the House does is to consider the bill as a whole, and determine whether, in its opinion, the measure ought or ought not to become law.

I have a vivid remembrance of my own experiences during the committee stage of an important measure which took some months in passing through the House of Commons. The official day would begin with a study of the pages of new amendments handed in and printed since the previous day. One would consider with respect to each amendment whether it could be accepted, whether it should be opposed, and if so, on what grounds, whether any alteration of form would render it easier to accept, or whether an alternative form should be suggested, the leading consideration in each case being consistency with the general principles of the bill and with its other provisions. One would dictate notes on those points and leave the shorthand writer under a strict injunction to have them ready by the time the debate on the bill began. Then one would hurry over to the minister's office, and discuss the most important points with him. These proceedings, with perhaps a brief interval for snatching luncheon, would occupy the time till the debate began. Then one would go down to the House, take one of the official seats under the gallery, watch the course of the debate, and scribble notes and suggestions intended to help the minister

from the draftsman's point of view. The difficulties of doing so were in my time enhanced — they have been diminished since — by the fact that one's official seat was at the other end of the House from that on which ministers sit, and one had to smuggle up notes to him as best one could — and they often did not arrive in time — unless he or some other member on his behalf could find time to come down to one's own end of the House for a colloquy there, a proceeding which was avoided if possible, because it not only occupied time, but might invite comment. One would sit there till near midnight or later, then home, and then — *da capo* — the same process would begin again next day. It was exhausting work while it lasted, and it might last a long time.

So much must suffice at present for the duties of the government draftsman on government bills. As to bills brought in by private members, the Treasury minute of 1869 directed that the parliamentary counsel should report on such bills in special cases referred to him by the Treasury. But at present, except in the case of such references, the parliamentary counsel is in no way responsible for the preparation or criticism of such bills. The special instructions are usually given in cases where the government, being favourably inclined to the principle of a private member's bill, promises to facilitate its passing on condition of his accepting the government amendments.[1]

No systematic supervision is exercised over private members' bills. The Home Office was at one time supposed to

[1] A similar course is often adopted in the case of amendments moved by private members on government bills. When such an amendment appears to the government to be satisfactory in substance but faulty in form, the government draftsman is not infrequently instructed to place himself in communication with the mover of the amendment, and help him to put his proposals into better shape.

exercise some kind of general supervision over them, but under the existing practice does not criticise any bills except those relating to Home Office subjects. Each government department is in the habit of watching bills specially affecting matters with which the department is concerned, and this departmental criticism frequently stops the progress of mischievous bills, or requires the insertion in them of necessary amendments. It is also the duty of the parliamentary clerk of the Treasury to call the attention of departments to bills affecting them. And, finally, the government often relies on the advice of the law officers of the Crown in considering whether any opposition should be offered to private members' bills. In practice, however, very few private members' bills succeed in getting through Parliament. The number of days allotted for their discussion is limited, and the chance of getting a good place on one of those days is determined by the fortune of the ballot. Unless a private member is very fortunate in the ballot, or can persuade the government to adopt his bill, or, at least, to give him a share of the time reserved for government bills, he can only slip his bill through by general consent as an unopposed measure, and subject to the risk of its progress being stopped by any member who says "I object." There is pretty sure to be objection in some quarters of the House, and there is usually a member who takes upon himself the functions of objector-general, and opposes the passage of any bill except after opportunity for explanation and debate.

The main duties of the parliamentary counsel relate to current parliamentary legislation. There are, however, three other classes of duties with which he is concerned: —

(1) Advising on questions affecting parliamentary legislation;

(2) Subordinate legislation, *i.e.* Orders in Council and statutory rules;

(3) Statute law revision bills and consolidation bills.

The parliamentary counsel was required by the minute of 1869 to advise on all cases arising on bills or acts drawn by him. The amount of work falling under this head is indefinite, for it is difficult to define or restrict the classes of cases which are, or may be, connected with legislation, past, pending, or prospective. In such cases it is sometimes convenient for the government to take the advice of the parliamentary counsel instead of consulting the law officers of the Crown; and the parliamentary counsel can often, from his knowledge of the history and intention of an enactment, give a clue to its true construction. For this reason, even where questions are referred to the law officers, the case for their opinion has frequently to be settled by the parliamentary counsel and preliminary questions have to be discussed with him.

About statute law revision and consolidation bills I have spoken already. About the important subject of subordinate legislation I shall have something to say hereafter. All I need say about it now is this. Under the minute of 1869 it was made part of the duty of the parliamentary counsel to draw or settle all such orders in Council as he might be instructed to draw or settle on special occasions. This is an exceptional, and not a general, duty, and the great bulk of orders in Council are drawn outside the office, by or under the instructions of the departments by which they are initiated. Most of the statutory rules are drawn in the same way. But where an order in Council or a set of statutory rules is of exceptional importance or difficulty, it is sometimes drawn in the office of the parliamentary counsel. For in-

stance, the code of rules under the Army Act of 1881, which was part of the great scheme of consolidating the Mutiny Acts and the Articles of War, was drawn in that office, and probably could not have been drawn elsewhere. It is so important that rules framed under an Act should be framed on the same lines as the Act itself, and it is so difficult to frame those rules properly without being intimately conversant with the provisions of the Act and the objects aimed at by it, that the parliamentary counsel not unfrequently finds himself involved in some kind of indirect responsibility for the proper framing of rules or orders under Acts drawn by him. The work of subordinate legislation has, however, always been regarded as extraneous to the ordinary duties of the office.

How far have the objects aimed at by Mr. Lowe, when he established the parliamentary counsel's office in 1869, been attained?

Those objects appear to have been: —

(1) Economy;

(2) Better control over government legislation with respect both to policy and to finance; and

(3) Improvement of the form of statutes.

I think that I may answer that all these objects have been substantially attained.

Under the old system, special fees on the scale of those paid to members of the parliamentary bar were paid to draftsmen for the preparation of government measures, and often amounted to very large sums. Under the new system the payment of such fees has practically ceased. The permanent staff of the parliamentary counsel's office has drawn all government bills with the assistance of a few outside counsel, employed and paid under the responsibility of the office.

Notwithstanding the growth of parliamentary legislation since 1869, the cost of drafting government bills has been reduced since that date.

The control exercised by the Treasury and the prime minister has also been made more effectual. As instructions for all departmental bills must come through the Treasury, it is no longer possible for the head of a department to initiate legislation without the knowledge or consent of the first lord of the Treasury and the chancellor of the exchequer, one of whom is nearly always leader of the House of Commons, nor to initiate without the knowledge of the Treasury legislation involving the expenditure of public money.

Perhaps the chief advantage which has arisen from the institution of the parliamentary counsel's office has been an improvement in the form of statutes. Acts of Parliament will always form the subject of adverse comments by the bench, the bar, and the public. But if the English statute book of the present day is compared with the English statute book of forty or fifty years ago, it is impossible to deny that the language of statutes has become more concise, uniform, and accurate, and that the arrangement of statutes has become more logical and consistent. The select committee of 1875 on Acts of Parliament expressly referred to "the better style of drafting which has been recently introduced into Acts of Parliament, as well with regard to the arrangement of clauses and the subdivision of the bill into distinct parts, as also with regard to the language used, which, in simplicity and clearness, is far superior to the 'verbose and obscure language' of former enactments."

Agencies similar to the office of the parliamentary counsel in England are to be found in British India, in the British self-governing dominions, and in other parts of the British

empire, but it is unnecessary to go into detail about them here.[1]

Now it is obvious that an office such as that of the parliamentary counsel is not suitable to the conditions of legislation in the United States, where representatives of the executive government have no place in the legislature, and where there are consequently no such things as government bills. If you consider it desirable to establish any special agency for preparing bills intended to become laws, or for criticising or improving the form of such bills, that agency would, I suppose, be appointed and controlled, not by the executive government, but by the legislature itself, or by its Speaker as its representative. It would be easy to suggest methods by which an American legislature might establish and utilise an official or semi-official agency of this kind, if it were disposed to do so. For instance, it might make a rule or a standing order requiring a bill, as a condition of its being allowed to emerge from committee, to be submitted, in respect of form, to an expert draftsman, appointed or approved by the legislature or by its Speaker. I say approved, because there might conceivably be a panel of approved draftsmen, any one of whom might be selected for this purpose. And the schools of draftsmen which some of your States and Universities are endeavouring to establish might do useful work in training the draftsmen to assist those legislatures.

Then, again, I can well conceive that a legislature would do well to appoint and maintain a small permanent committee, whose duties it would be to keep a watchful eye over the condition of the statute book, to suggest, and to supervise the execution of, such useful processes as the indexing, ex-

[1] See my *Legislative Methods and Forms*, Chapter IX.

purgation, and revision of the statute book, and the consolidation of statutes; in short, all those processes which are required to make the statute law of a country, or of a particular State within that country, more knowable and intelligible, to make it rather more easy for the citizen to know and understand those laws which he is supposed to know, but which, in point of fact, he does not know, and, being only a human being, with limits to his intelligence, cannot know. Whether such a committee would do useful work would depend partly on the extent to which the legislature would aid it by appropriations, and, still more, on the zeal, capacity, patience, and industry of the chairman and secretary of the committee. Work of this kind, and I speak from painful experience, is apt to be dull and laborious. But it ought not to be 'scamped,' and for carrying it on with thoroughness and persistence qualities are required which it is not always easy to find.

These are the kinds of suggestions which occur to an English draftsman as possibly practicable, but of course they can only be offered with great diffidence.

VI

RULES FOR THE GUIDANCE OF DRAFTSMEN

THE composition and language of statutes is a subject which has been comparatively neglected by the authors of legal literature, and on which not very much has been written. On the interpretation of statutes there are several well-known textbooks. The object of the writers of these books has been to collect such judicial decisions and other authorities, and to formulate such rules and principles, as may assist the courts and legal practitioners in determining the meanings which ought to be attached to obscure or ill-expressed enactments. Books of this kind are very useful to the draftsman of an Act of Parliament as showing the meaning which the courts may be expected to attach to particular expressions and the canons of construction which the courts will observe. They are also useful to him as illustrating the pitfalls which he should avoid, and the consequences which the use of loose or inaccurate language may entail. But they are written primarily, not for the draftsman, but for the practitioner who has to advise on or argue cases on statute law, or for the courts which have to decide such cases. They are concerned rather with the pathology or nosology of statutory drafting than with its laws of health. They illustrate bad drafting; they do not, except indirectly, lay down rules for good drafting. On the latter branch of the subject, as I have said, comparatively little has been written.

Of the treatises which have been written on this subject, there are two to which I should like to direct your special attention.

Among the works of Jeremy Bentham you will find a treatise on what he called Nomography, or the Art of Inditing Laws. The materials for this treatise appear to have been composed between the years 1811 and 1831, but, like so many of his works, they were not put together or completed by him, and were left to be edited and published after his death in 1832.[1] Bentham was a great coiner of words, and though he does not seem to have invented the word "nomography," for it appears to have existed as a dictionary word before his time, he was the first who attempted to give it currency in the meaning which he attached to it. He deals with the subject in his usual systematic, comprehensive, and exhaustive manner. He explains that he employs the term "nomography" to distinguish that part of the art of legislation which has relation to the form given, or proper to be given, to the matter of which the body of law and its several parts are composed: the form, in contradistinction to the matter, and in so far as the one object is capable of being held in contemplation apart from the other. He then tells us that he will proceed to consider: —

1. The relations which nomography bears to the government of a private family, to logic, to a pannomion or universal code of laws, to proposal and petition, and to private deontology;
2. The ends in view in the case of nomography;
3. The imperfections to which it is exposed;
4. The remedies for those imperfections;
5. The subject of language;
6. The perfections of which the legislative style is susceptible; and
7. Lastly, the form which enactments may assume.

[1] *See* Bentham's Works (Bowring's edition), III.

You may perhaps wonder what nomography has to do with the government of a private family. But this reference illustrates the meticulous care with which Bentham endeavoured to consider every possible aspect and relation of any subject with which he dealt. He would probably be more read if he had not been so excessively anxious, especially in his later years, to say everything that ought to be said or could be said on any given subject. In this case he thought it necessary to point out the distinction between commands emanating, or, as he was pleased to call it, "emaning," from a State and commands emanating from the head of a family, and to explain why laws or commands of the first class required, whilst commands of the second class did not require, subsidiary or inducement-giving laws, laws defining the reward to be given or the evil to be inflicted as inducements for doing or refraining from certain actions. And he gives as illustrations of the family laws or commands which do not require these specific inducements, the following: "Set the loaf on the table"; "Put the coals on the fire"; "Open the window." "In these commands," he says, "may be seen so many examples of the laws of which a private family is the scene; and in seeing these laws, what will also be seen is the integrality of their character."

I pass over what he says about the relations of nomography to logic, to his Pannomion or universal code, to proposals and petitions, and to private deontology, and come to his remarks about the proper end to be kept in view by the nomographer, be he draftsman or legislator.

The general end of nomography, he says, is relative notoriety, by which he means framing and publishing the law in such a way as to bring it to the knowledge of the proper persons. The proper persons — not necessarily all persons.

It need not reach everybody's mind. For instance, when a law imposes death as a penalty for an offence, the law need not reach the mind of the possible offender, because prudence and morality ought to be sufficient deterrents, but it ought to reach the minds of those who have to administer the law lest they should apply the wrong penalty. Bentham does not express himself quite in this way, but this is what he means. Then he asks what are the particular ends to be arrived at, or, as he puts it, what are the means best adapted to the general end. His answer is the avoidance of the general modes of imperfection, of which, in point of expression and method, the style of legislative penmanship is susceptible. "For the attainment of this end, make your meaning known and understood by every person of whom you expect that he should act in consequence." An excellent general rule, which he enforces and illustrates by enumerating and describing the chief modes of imperfection which are to be avoided. He divides these into imperfections of the first order and imperfections of the second order. The imperfections of the first order which he enumerates are: 1. Ambiguity. 2. Obscurity. 3. Overbulkiness. His list of imperfections of the second order is: 1. Unsteadiness in respect of expression, by which he means the use of different words for the same thing. 2. Unsteadiness in respect to import, by which he means using the same word in different senses. 3. Redundancy. 4. Longwindedness. 5. Entanglement. 6. Nakedness in respect of helps to intellection. (He means by this such things as cutting up a law into sections, numbering sections and giving them head-notes and so forth.) And 7. Disorderliness. He finds all these imperfections, especially the last, pre-eminently illustrated by the English statute book, which, according to him, is the great model and

storehouse of everything that a good draftsman ought to avoid. Study, if you can, an English statute, and express yourself as differently from it as possible. That is an epitome of his advice. And so he is led up to the topic in which he really revels, in which he runs riot with inexhaustible enjoyment, "the general depravity of the style of English statutes." "For bringing to view and summing up the imperfections of the English statute law," so he begins his remarks on this topic, "no more is requisite than to bring to view and sum up the points by which it is distinguished from the ordinary language of the multitude. Wherever it differs, it differs to its disadvantage — peculiar absurdity the immediate effect, peculiar mischief the result. These imperfections exercise their baneful influence not only on the mind of the subject, but on the mind of the legislator himself, which they darken and confuse." He has examined a single statute and found in it "a multitude of such gross palpable grammatical errrors as scarcely any schoolboy, who had made his way to the upper form of any school in which no language was taught beside English, would see himself convicted of without shame."

After this comes a repetition and amplification, with illustrations from the statute book, of the several imperfections which he enumerated before: uncognoscibility, ambiguity, obscurity, overbulkiness, unsteadiness, redundancy, long-windedness, complexity, whence entanglement, nakedness in respect to helps to intellection, unapt arrangement and disorderly collocation. Hard things have been said about the language of English statutes since Bentham's time; but never has it been so mercilessly belaboured as by Bentham himself.

The chapters on Imperfections are followed by chapters

on Remedies, and these chapters are well worth reading, if you can get over the preliminary obstacle presented by the crabbedness of Bentham's style. That, I admit, is a very big "If." Bentham in his early years wrote admirable English, terse, lucid, vigorous, racy, pungent. The celebrated *Fragment on Government*, which was published in 1776, is a model of style. But in his later years his eccentricities grew upon him until he became almost unreadable except as interpreted and translated by such faithful disciples as Dumont. And the treatise on "Nomography" belongs to his latest years. Still, if you can surmount this preliminary obstacle, the chapters to which I refer deserve and would repay careful study. They deserve study for two reasons. The first reason is historical. Bentham was, as I have said before, perhaps the greatest law reformer that ever lived. He was certainly the greatest law reformer that England ever produced. He died in the year 1832, the year in which the Reform Act was passed, and no man has left so deep an imprint on the form and on the substance of subsequent English legislation. The steps which I have described to you for improving the form of the English statute book by the processes of indexing, expurgation, revision, and consolidation, all owe their initiation directly or indirectly to his fertile and suggestive brain. So also does the better style of drafting statutes to which attention was directed by the Select Committee on Acts of Parliament which sat in 1875. It would be interesting to take — or rather to get a small army of sturdy library assistants to take — a set of the English Statutes at Large as they existed in Bentham's time, set it by the side of a modern edition of the Statutes Revised, and then — bearing in mind that more than 80 years fruitful of legislation have passed since Bentham's death, —

consider why, notwithstanding this additional legislation, the bulk of the later edition is materially less than the bulk of the earlier edition, and how far this reduction of bulk is due to the adoption of Bentham's suggestions. It would be interesting also to take a typical Georgian statute, one of those which Bentham selected as illustrations for the draftsman of "How not to do it," compare it with any English statute of the last 40 years, note the differences in form, and consider how far these differences correspond with suggestions for improvement which are to be found in Bentham's treatise on "Nomography."

This, then, is the historical reason for studying those chapters. And there is a practical reason also. Hidden away in their crabbed pages may be found a number of shrewd practical rules, maxims, suggestions, criticisms, and warnings, which the draftsman of the present day might with profit study and take to heart. Take, for instance, the proposition and rule which he lays down with respect to the structure and length of sentences: —

Proposition: The shorter the sentence, the better.

Rule: Minimize the length of sentences.

Reasons: 1. The shorter the sentence, the clearer it is to the eyes of the reader, the easier to retain in his memory.

2. The shorter the sentence, the clearer is it in the eyes of the legislator and the judge.

This may mean more sentences, but every sentence will be easier to understand and remember.

Here again are some rules which he suggests as tending to prevent the evil of longwindedness: —

Avoid repetitions from habit of useless formulas; as in English practice.

Repeat not self-evident propositions: Ex. *Whereas it is expedient*, &c.

Lists of species, once given, form a generic term, which afterwards substitute.

Exceptions excepted, let the masculine singular comprehend both genders and numbers.

Denominate, enumerate, and tabulate principles. It facilitates reference, and thereby contributes to conciseness.

He provides some practical suggestions for making it easier to find your way about the contents of an Act. "Break a law down into parts," he says, "and affix a different number to each part." This is the foundation of the modern practice — it is, I believe, quite post-Benthamic — of dividing an Act which deals with different but cognate subjects into parts, each separately numbered and described, and of grouping sections under a common descriptive heading printed in italics. Little devices of this kind are, as every one knows, great time-savers for a busy man, and it is fortunate for us that they were not considered unworthy of the attention of Bentham's philosophic but intensely practical mind.

I have said that Bentham's writings, including his treatise on "Nomography," exercised an enormous influence on subsequent English legislation. But this particular treatise did not give rise to any extensive literature. John Austin, the well-known writer on Jurisprudence, touched on the subject dealt with by the treatise, and I will quote two of his remarks. The first is this: —

I will venture to affirm [he says] that what is commonly called the *technical* part of legislation is infinitely more difficult than what may be called the *ethical*. In other words it is far easier to conceive justly what would be useful law, than so to construct that same law that it may accomplish the design of the law-giver.

And in the second, he says that: —

Statutes made with great deliberation, and by learned and judicious lawyers, have been expressed so obscurely or have been

constructed so inaptly that decisions interpreting the sense of these provisions, or supplying and correcting the provisions *ex ratione legis*, have been of necessity heaped upon them by the courts of justice. Such, for example, is the case with the Statute of Frauds which was made by three of the wisest lawyers in the reign of Charles II, Sir M. Hale (if I remember right) being one of them.

I take these quotations from a little book written by the man who is more responsible than any one else for the form of modern English statutes. My master in the art of parliamentary drafting was the late Lord Thring, and I began to work under him so long ago as the beginning of the year 1870, not long after he had been made head of the newly constituted office of the parliamentary counsel. He used to put into the hands of those who assisted him, for their guidance, an official memorandum which he had drawn up, and which was entitled *Instructions to Draftsmen*. A great many years afterwards I was putting together materials for the book which I called *Legislative Methods and Forms* and which was published in 1901. At that time Lord Thring's instructions to draftsmen had long been out of print, and copies of them were difficult to obtain. So I thought it might be useful to insert in my book a chapter on the Form and Arrangement of Statutes, consisting of practical notes which I had made from time to time for the guidance of myself and of those who had worked with me or under me in the preparation of legislative measures. Lord Thring was a careful and admiring student of Bentham, and his *Instructions* are permeated by the Benthamic spirit. My own practice was modelled largely on Lord Thring's teaching. So you will see the affiliation. When my book was published, Lord Thring was a very old man, well past eighty, but the appearance of my book stimulated him, very

fortunately, I think, to hunt up his old memorandum or treatise, and to republish it under the title of *Practical Legislation, the Composition and Language of Acts of Parliament and Business Documents.*[1] He prefixed to it an introduction, which is mainly autobiographical, and which throws interesting glimpses on the experiences of a veteran draftsman. He tells us how he passed from his university career at Cambridge, "to the study of conveyancing, the driest of all earthly studies," he calls it, and "there," he says, "I found that the apparent object of legal expression was to conceal the meaning from ordinary readers, and that the forms which a law student of that period was incessantly employed in copying were wordy cairns, on to which each conveyancer of eminence had from time to time thrown a new word till the whole became a huge heap of unintelligibility." Jeremy Bentham could not have expressed himself with greater vigour.

Briefless [he goes on to say] and therefore with much leisure, I devoted a great deal of time to the study of contents of the statute book, and here I found a great contrast between its earlier and its later pages. The prince of all draftsmen, Stephen Langton, the Papal Legate, expressed Magna Charta in short and precise language; for example, no one can complain of ambiguity or verbosity in the most famous of all written enactments which declares, when translated "To no man will we sell, to no man will we deny or delay, right or justice." The draftsman also of the twenty-second year of Henry VIII (c. 9), leaves no room for doubt as to his meaning when he says, after reciting that the cook of the Bishop of Rochester had put poison into a dish of broth that he had prepared, "Our said Sovereign Lord the King of his blessed disposition inwardly abhorring all such abominable offences . . . hath ordained and enacted by authority of this present Parliament that the said poisoning be adjudged and

[1] London, John Murray, 1903.

deemed high treason and that the said Richard for the said murder and poisoning of the said two persons . . . shall stand and be attainted of high treason and because that detestable offence now newly practised and committed requireth condign punishment for the same, it is ordained and enacted . . . that the said Richard Rose shall be therefore boiled to death without having any advantage of his clergy."

Forcible language certainly, and expressive, and although one might be disposed to be critical, and to feel some doubts as to whether the Plantagenet and Tudor draftsmen, strong and picturesque as their language often was, could be prudently followed as models by draftsmen of a later and more prosaic age, we cannot help being moved by the enthusiasm which the old man displays for the *Vetera Statuta* over which he had pored in his earlier and briefless days.

As to the statutes of more modern times, he contents himself with quoting and adopting the language used by John Austin in a passage which I have quoted to you already. Then he goes on to give, as he used to be fond of giving when I sat at his feet in my own earlier days, ludicrous instances of confused expressions which occasionally appeared in the pages of the statute book. Thus, among the things which might be expressed differently, there is an instance in an Act of George the Third (52 G. 3, c. 146) under which penalties were to be given half to the informer and half to the poor of the parish. And the only penalty imposed by the statute was transportation for fourteen years. Nor does he commend the following definition in a local Improvement Act. "The term new building means any building pulled or burnt down to or within ten feet from the surface of the adjoining ground." Amendments proposed to bills, amendments from which he suffered grievously when government draftsman, have not infrequently, he says, erred

in vagueness. And he gives as an illustration an amendment proposed by an eminent Queen's counsel in 1865.

> Every dog found trespassing on inclosed land unaccompanied by the registered owner of such dog or other person who shall on being asked give his true name and address may be then and there destroyed by such occupier or by his orders.

Then he goes on to tell us how, to qualify himself for avoiding, if possible, such pitfalls as these, he studied a book by Mr. Coode on legal expression, and the American codes, especially those of Mr. Field, and also the code of procedure of the State of New York. As to Mr. Coode's book, I am interested to see that a recent writer on statute law-making in the United States has unearthed and utilised a copy of it. But in his own country, Mr. Coode has, I fear, long been forgotten, and I searched in vain for his name in the *English Dictionary of National Biography*. Nor am I sure that the compositions of David Dudley Field enjoy quite the same reputation now as they did when Lord Thring was a young man. But I am sure that you will have been interested in hearing that when the most famous of our draftsmen was learning his lessons, it was to New York that he turned for models of expression and arrangement. Well, after studying these models, he found that the subjects of Acts of Parliament, as well as the provisions by which the law is enforced, would admit of being reduced to a certain degree of uniformity; that the proper mode of sifting the materials and of arranging the clauses can be explained; and that the form of expressing the enactments might also be made the subject of regulation. He found also that the suggestions made as to the course to be taken to ensure clearness are not solely applicable to Acts of Parliament, but with a little adaptation may be applied to every sort of

composition employed in business. Before very long Thring got drafting employment from the government and was able to apply the principles which he had learnt. He illustrates the application of those principles by referring to the great Merchant Shipping Act of 1854, which he drew, and which has now been superseded by a later Act.

Then, in order to show that whatever defects might exist in his treatise, they were, at all events, not due to ignorance or want of experience, he goes on to describe his long official career, and how, after 1861, when he became Home Office Counsel, he was for the remainder of his official life occupied almost entirely in preparing legislation.

There are some delightful reminiscences of Gladstone and Disraeli, under both of whom he served, and as these reminiscences are admirable illustrations of the mode in which Acts of Parliament are prepared in England, I feel justified in quoting them here. As an example of the mode in which a government bill is constructed, Thring takes the Irish Land Act of 1870 which he drew for Gladstone.

> The instructions given me were as usual, to a great extent, verbal ones, conveyed during a series of conferences with Mr. Gladstone. I used to attend him at his house generally by myself. I never hesitated to tell him my mind, "This will not do"; he would then stand up with his back to the fire and make me a little speech urging his view of the case; I then replied shortly till the point was settled. I recollect on one occasion his manner was so vehement that I thought I must have gone beyond bounds in contradiction and began to apologise. His reply was, "Go on as you always have done and make no apologies; if my manner has led you to think that I am offended, I am sorry for it."
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> Mr. Gladstone's [he goes on to say] was the most constructive intellect with which I ever was brought in contact and also was the most untiring in devotion to its object. He understood and revised every word of a bill and even settled the marginal

notes. Once only had we any discussion as to the arrangement of a bill, and this arose on the Irish Disestablishment Bill. I wished to put in one short clause at the very commencement, a sentence disestablishing the Irish Church. Mr. Gladstone disapproved and I was about to accept his instruction to postpone the provision when Lord Granville interfered, saying, "Had you not better pay attention to the draftsman's suggestions?" Whereupon Mr. Gladstone gave way and the proposed clause appeared at the beginning of the bill.

This is his account of Gladstone and his methods. I must go on and quote what he says of Disraeli, because there could be no better illustration of the severe stress under which government draftsmen occasionally work in England.

A strange contrast to Mr. Gladstone's management of bills was that of Mr. Disraeli. He seemed to have an intuitive perception of what would pass the House of Commons, but he cared nothing for the details of a bill, and once satisfied with the principle of a bill, he troubled comparatively little about its arrangements or its construction. It was in course of preparing the Reform Bill of 1867 and watching every night its passage through Parliament that I had ample means for the first and last time of judging of Mr. Disraeli's characteristics.

I was constantly struck by his great skill in overcoming difficulties as they arose in Parliament, and his tact in meeting by judicious compromises the objections of his opponents. His courtesy to me never failed even under the most trying circumstances. My first introduction to him was so curious that it may be worth telling. I think it was on Wednesday, November[1] 13, 1867 that Mr. Walpole, then Home Secretary, gave me to read a copy of the Reform Bill which had been prepared by a parliamentary agent. I expressed to him an opinion unfavourable to the bill as drawn. This opinion was repeated to Lord Derby, who sent for me to the House of Lords on Thursday 14th. I told him in substance what I had told Mr. Walpole. Lord Derby said it was too late to take any steps to alter the Bill to the extent which I

[1] This is a slip. It was in March, 1867.

wished, and I undertook at his request to communicate with the draftsman and to tell him to proceed with his work. I returned to my office and was actually engaged in writing the letter when Mr. Disraeli's secretary, now Lord Rowton, came in and told me as an instruction from Mr. Disraeli to entirely redraft the bill, and added that the bill must be ready on Saturday, 16th. Accordingly next day I took the bill in hand, and working with two shorthand writers from ten till six, I completed it. The bill was printed during the night and was laid before the Cabinet on Saturday. It was considered on Monday by Mr. Disraeli; he personally instructed me in the matter and the bill was circulated to the House of Commons on Tuesday. This *tour de force* in draftsmanship could not have been accomplished, had I not been saturated, so to speak, with reform from my preparation of the Franchise Bill of 1866, when I prepared for the Government a complete series of memoranda and notes relating to the franchise, including a comparison between the municipal and Parliamentary franchises with a view to showing the advantage which would result from assimilating the Parliamentary franchise to the municipal franchise. The work at the time had seemed to be useless, for, as is well known, the Franchise Bill of 1866 never became law.

Having described his experiences Lord Thring goes on to sum up his practical conclusions.

The sum of the whole matter is this, that to prepare a good bill the draftsman must receive sufficient instructions, but they will necessarily be short, and he must exercise a very large discretion in filling up the gaps. He ought to draw a memorandum and to supply notes furnishing the minister with information on all technical points.

The bill should be clear and should state at the very commencement the important principle of the measure and the greatest pains should be taken to separate the material from the comparatively immaterial provisions.

Before commencing to draw the bill the draftsman should ask the minister on what questions he wishes to take divisions, and these points should be placed at the beginning of the bill in the

clearest and most concise form so that it should not be possible that a division should take place on a complicated issue. Above all, referential legislation must, as far as possible, be avoided. It is not fair to a legislative assembly that they should, as a general rule, have to look beyond the four corners of the bill in order to comprehend its meaning.

Then follows a warning which the youthful draftsman should take to heart and which the experience of the older draftsmen will often justify.

It may be well to warn the draftsman that in his case virtue will, for the most part, be its own reward, and that after all the pains that have been bestowed on the preparation of a bill, every Lycurgus and Solon sitting on the back benches will denounce it as a crude and undigested measure, a monument of ignorance and stupidity. Moreover, when the bill has become law, it will have to run the gauntlet of the judicial bench, whose ermined dignitaries delight in pointing out the shortcomings of the legislature in approving such an imperfect performance.

Are these strictures on the judicial bench too severe? Remember that they came from an old draftsman still smarting under the lash. I wonder whether the industrious and possibly conscientious draftsmen of the eighteenth century who compiled Acts of Parliament in the orthodox conveyancing jargon of the day, and whom Bentham so heavily belabours, used similar language about him. And it must be borne in mind that Lord Thring's condemnation of judicial criticism is not unqualified. He admits frankly that some judges, and those not the least eminent, including the late Sir James Fitzjames Stephen, who had enjoyed the advantages of having been a draftsman before he was a judge, both expressed a different and juster view of the draftsman's position and made greater allowance for the difficulties which he has to encounter and surmount.

He gives as an instance of the labour which the preparation of an Act of Parliament may involve, the Army Act of 1881. This Act, which is a standing form, in force only for a year but annually renewed with or without amendments, has taken the place of the old Mutiny Acts, which had to be re-enacted as new laws every year. For many generations nobody thought of reading the Mutiny Acts. They were in the old form, and everybody took it for granted that they were all right and merely reproduced the existing law. You may perhaps know that each Mutiny Act used to come into operation, as the Army Act still does, at different times in different parts of the world. And I remember discovering in one of the very last of them a provision that it should come into operation at a specified date in Spain and Portugal. This provision had been inserted at the time of the Peninsular War, and, like the sentry in front of the guarded flower in the old Russian story, had remained unnoticed ever since. Nobody had taken the trouble, or had thought it worth while, to strike it out, and there it stuck till near the end of the nineteenth century. Well, this easy and comfortable way of re-enacting the Mutiny Act went on for many generations. At last, about the time when Irish obstruction began to make itself a serious factor in English legislation, Mr. Parnell and his friends realised that the Mutiny Act might be utilised as an instrument of obstruction. They studied it, found that it was full of defects, filled the notice paper with pages of amendments, and spent hours and hours, night after night, in discussing these amendments with great ingenuity and pertinacity. This became intolerable, and the government of the day came to the conclusion that they must bring into operation a scheme which had been proposed by Mr. Cardwell, when Minister for

War, for revising the military law and enacting it in a more satisfactory form. Lord Thring shall tell in his own words what followed: —

> The Army Act of 1881, like the siege of Troy, took ten years before it was brought to a conclusion. Instructions were given to me by Mr. Cardwell in 1867; a bill was prepared, but was not proceeded with; in 1872 the subject was revived and a complete scheme was prepared for consolidating the Mutiny Act and the Articles of War. This scheme was partially considered by the War Office in 1873. It was then again laid aside till 1877, when a short interval of discussion occurred, after which it was once more shelved until 1878, when a select committee was appointed by the Secretary of War to consider the bill. This committee gave a general approval to the bill, and in 1879 an almost identical measure was at last introduced into Parliament and passed.
>
> Some idea of the labour involved in preparing this measure may be formed from the fact that the papers written to explain the law alone fill a folio volume of 1067 printed pages. The Act was afterwards slightly amended, and consolidated, and under the title of the Army Act is annually brought into operation by a short special Act.

Have I detained you too long with quotations from Lord Thring's introduction to his little book? I hope not and I think not. What I have been trying to do is to give you some notion of what may possibly be learnt from English experience in drafting Acts of Parliament and improving their form, and no one had longer, wider, more varied, or riper experience in this department than the late Lord Thring.

If I were conducting a practical class, what the Germans call a Seminar, in the study of the art and craft of preparing and framing statutory enactments, I should be disposed to take as my textbook Lord Thring's little book. And I should do so because it not only lays down admirable practical rules as to the arrangement of the subject-matter of an

Act, and as to the composition of sentences, but also illustrates those rules by examples showing the kind of arrangement and language which will be found useful in particular classes of cases. But I am not standing here in a professorial capacity, and therefore I shall content myself with making a few remarks and giving a few hints and warnings, based on my own personal experiences. I must, however, remind you again, as I have reminded you before, that these remarks are suggested by English conditions of legislation, and that American conditions are widely different.

First, as to the subject of style and language. It may be said that the rules of good drafting are simply the rules of literary composition, as applied to cases where precision of language is required, and that accordingly any one who is competent to draw in apt and precise terms a conveyance, a commercial contract, or a pleading, is competent to draw an Act of Parliament. But this is obviously a superficial view.

In the eighteenth century, and even later, a good many English statutes appear to have been drawn by conveyancers, and readers of Bentham will remember what he says about the conveyancing style. That style has been improved and shortened since Bentham's time, though I think it is still capable of much improvement. But even if it were more free from the charges of redundancy, prolixity, and repetition, it must be borne in mind that the rules and traditions of good conveyancing are not applicable, without serious modifications, to parliamentary drafting. The framer of even the most complicated settlement has to provide for a limited number of cases or contingencies, which he can enumerate exhaustively, and for which it is sometimes desirable that he should make specific rather than general provision. But the framer of an Act of Parliament

has to lay down rules which are to be in force for an indefinite time, and to be applicable to conditions and circumstances of which the existing range and variety are of formidable complexity, and the modifications of which in the future are impossible to predict. Practice in the preparation of such instruments as the articles of association of a company, to which I suppose in your country corporation charters more or less correspond, is of greater value than practice in ordinary conveyancing, but even here the range and variety of circumstances which have to be contemplated is obviously much narrower than in the case of a general law. If a parliamentary draftsman is to do his work well, he must be something more than a mere draftsman. He must have constructive imagination, the power to visualise things in the concrete, and to foresee whether and how a paper scheme will work out in practice.

Again, the draftsman of an Act of Parliament has to prepare a document which has to be considered and possibly modified by a large number of persons, over which he can only exercise a very imperfect control after it leaves his hands, and the provisions of which may have to be settled on the spur of the moment and in the heat of debate. If its several parts are too tightly dovetailed together, if it is so constructed that a modification of one part necessarily involves numerous modifications of other parts, an amendment made in the course of debate may throw it hopelessly out of gear. For these reasons, the parliamentary draftsman is obliged, by the conditions of his craft, to employ a generality of expression, and to give his framework an elasticity of construction, which would shock the conveyancer.

Then, between the point of view of the lawyer and the point of view of the legislator there is a material difference.

The lawyer proceeds on the basis of the existing law. He endeavours to ascertain what that law is, and to apply it to the facts. The legislator proceeds on the view that the existing law is defective or insufficient, and considers how the law should be changed in order to meet the requirements of the case. It is often difficult for the trained lawyer to change his accustomed point of view, and consider, not merely what the law is, but what it ought to be.

Lastly, the draftsman of a public Act of Parliament has to be guided by rules, not only of logic, but of rhetoric. A bill for such an Act may be regarded from two points of view. From one point of view it is a future law. From another point of view it is a proposal submitted for the favourable consideration of a popular assembly. And the two points of view are not always consistent. The mode of expression and arrangement which is most suitable to officials who have to administer the law, or to lawyers who have to explain the law, is not always that which is most suitable to the minister or other member of Parliament, who has to pass the law. Lord Thring's aphorism, "that bills are made to pass, as razors are made to sell," expresses an important half-truth. The minister in charge of a bill will often insist, and wisely insist, on departure from logical arrangement with reference to exigencies of discussion. He will have considered how he intends to present his proposals to Parliament, and to defend them before the public, and will wish to have his bill so arranged and expressed as to make it a suitable text for his speech. If the measure is at all complicated, he will desire to have its leading principles embodied in the opening clause or clauses, so that when the first fence is cleared, the remainder of the course may be comparatively easy. In settling the order of the following clauses, he will

consider what kind of opposition, and from what quarter, they are likely to evoke. He will deprecate unnecessary length, and will often wish to have his measure so drawn that it can be contained in a single clause or appear on a single page. He will prefer a few long clauses to many short ones, bearing in mind that each clause has, as a rule, to be separately put in committee. His theoretical objections to legislation by reference will often yield to considerations of brevity. He will eschew technical terms, except where they are clearly necessary, remembering that his proposals will have to be expounded to, and understood by, an assembly of laymen. He will bear in mind that members of Parliament, like other Englishmen, have a great respect for precedents, and will prefer a form of expression borrowed from, or having an analogy in, another Act of Parliament. And he will have learnt that there are certain provisions and expressions at which Parliament instinctively shies, others which it readily accepts. The draftsman has, of course, to bear in mind all these considerations. Indeed, it may be said, without disrespect, that he has to study the idiosyncrasies of Parliament much as a nisi prius barrister has to study the idiosyncrasies of a common jury.

Having said thus much on the general subject of style, may I give you some of the practical hints and suggestions which I used to find useful to bear in mind when I was engaged in parliamentary drafting and which I tried to impress on the minds of those who worked under me? They are much to the same effect as those which are to be found in Lord Thring's useful little book, but I will express them in my own language. You will forgive their didactic character, and may imagine, if you like, that I am addressing an English draftsman.

Before beginning to prepare a bill take care to master the subject-matter. Remember that where a doubtful question of construction arises, the courts are entitled to consider the previous law and practice, the mischief or defects which the law was intended to remove, and the nature of the remedy proposed. So, before devising a remedy, you must know the existing law and practice, and have a clear conception of the mischief or defects for which the remedy is required.

You will find the law in Acts of Parliament, in judicial decisions, and in legal textbooks. The practice, that is to say, the way in which the law actually works, is less easily learnt. You may often obtain information from blue books, from debates in Parliament, and from similar sources, but the information you want is not always available in a written form. It must often be derived from personal experience, or supplied by persons having such experience.

The defects which the proposed legislation is intended to remedy are usually to be gathered from parliamentary and other discussions and from reports of royal commissions or parliamentary or departmental committees.

You should consider with respect to each proposed enactment whether parliamentary legislation is really required, and whether the object might not be attained by administrative regulations or by subordinate legislation, such as orders in council or statutory rules, and sometimes whether, if legislation is required, it should not be embodied in a local Act.

For the purpose of studying the Acts I used to find it the most convenient plan to obtain and fasten together King's Printer's copies of the several Acts, and then strike out those

portions which have been repealed by subsequent legislation, adding marginal notes to show how they have been repealed.

You will often find it useful to have lists of relevant judicial decisions, arranged in chronological order, and showing the point decided in each case. Useful, also, will be a short bibliography of the blue books, textbooks, etc., bearing on the subject of the measure.

It will save much trouble if you embody in a memorandum the results of the information you have collected. Several documents of this kind may be required. It may be necessary to trace historically the course of previous legislation, and of discussions in Parliament and elsewhere, and to show how the existing statute law has been interpreted by judicial decisions and has been construed in practice. A memorandum stating the leading features of the proposed legislation, and raising clearly the questions of principle to be decided, will usually be required. This will be useful for discussions preceding the introduction of the bill and also as a brief for the speech required on introduction or second reading. In the case of a government measure, a shorter memorandum, dealing only with the main points, may be required for the use of the Cabinet, and a still shorter memorandum may in some cases be prefixed with advantage to the bill as introduced. Information of a more detailed kind should be embodied in the notes on the several clauses, and in preparing these notes you should take care to quote fully, and to give precise references to, the enactments bearing on the subject-matter of each clause, and to supply such other particulars as may be required for discussion in committee or in the preliminary conferences. You should give the information in such a form as to be available for immediate

use, and without reference to books or other documents. A statement in a tabular form or otherwise of the authorities who will be charged with the execution of the law, and of their powers and duties, will often be of great value.

When the measure is complex, there should be, in the first instance, a "scheme" or "heads of a bill" such as can be subsequently elaborated into clauses.

You will have to consider the arrangement of a bill both from the parliamentary and from the administrative point of view.

If the bill is a fighting bill, the arrangement is of great political importance. You should frame the bill so that the main issues which its proposals raise are disentangled from subordinate issues, are placed in the forefront of the measure, and are arranged in such a manner as to facilitate discussion in committee. Where the decision of an issue raised by one clause depends on the decision of an issue raised by another clause, the latter clause must come first. You should take care also that one clause does not raise incidently an issue which can be more conveniently discussed in connexion with a later clause. Subordinate matters should be dealt with in later parts of the bill. Matters of detail should be relegated to schedules or left to be provided for by rules.

So far as parliamentary exigencies will admit, you should arrange the subject-matter of a bill with reference to administrative convenience; in other words, its arrangement should be orderly and logical.

Normal and general provisions should be placed first. Special, exceptional, and local provisions should be placed towards the end.

Temporary and transitional provisions should be placed at the end of the bill, because, when they are spent, they

can be repealed without making gaps in the main body of the Act.

As a general rule, it is convenient to lay down, first the rules of law to be observed, and then to state the authorities by which they are to be administered and the procedure to be followed in administering them.

You can make the framework of a bill more intelligible by dividing it into parts and by grouping clauses under italic headings. But you should avoid excessive subdivision. As a rule, a bill should not be divided into parts unless the subjects of the parts are so different that they might appropriately be embodied in separate Acts. The division of an Act into parts may affect its construction by indicating the scheme of arrangement.

The printer will, if so directed, prefix to the bill an 'arrangement of clauses' made up from the marginal notes. You should study this table for the purpose of testing the convenience and logical sequence of the arrangement adopted.

Pay attention to the framing of your marginal notes to clauses. A marginal note should be short and distinctive. It should be general, and usually in a substantival form, and should describe, but not attempt to summarise, the contents of the clause to which it relates. For instance, a marginal note should run: "Power of local authority to, etc.," and not "Local authority may, etc."

The marginal note often supplies a useful test of the question whether a subject should be dealt with in one or more clauses. If the marginal note cannot be made short without being vague, or distinctive without being long, the presumption is that more clauses than one are required.

A long and complex clause should be cut up into subsections.

Each sentence should be as short and simple as possible.

The rules to be laid down will be either general or special, and either absolute or qualified.

Where a rule is to apply only to a particular case or set of circumstances, you will usually find it most convenient to state the case or set of circumstances first and let the rule follow. But where the rule is to apply to several cases or sets of circumstances, it is often convenient to state the rule first and enumerate the cases afterwards.

Where the rule is to be subject to qualifications, exceptions, or restrictions, these should follow the statement of the rule. But, it is often convenient to prefix to the rule words indicating that it is to be so qualified.

Avoid enumeration of particulars. It is almost impossible to make the enumeration exhaustive, and accidental omission may be construed as implying deliberate exclusion, in accordance with the maxim *Expressio unius est exclusio alterius*.

State each rule in general terms, but, so far as practicable, test its application to particular cases for the purpose of seeing how far it will work in each case.

The language of the bill should be precise, but not too technical. An Act of Parliament has to be interpreted, in cases of difficulty, by legal experts, but it must be passed by laymen, be administered by laymen, and operate on laymen. Therefore it should be expressed in language intelligible by the lay folk.

In some cases the compromise between popular and technical language may be effected by means of a definition. But definitions are dangerous and should be sparingly used.

Do not use more words than are necessary to make the

useful textbooks on the interpretation of statutes. Among the most important of these rules are: —

1. The rule that a statute must be read as a whole. Therefore the language of one section may affect the construction of another.

2. The rule that a statute may be interpreted by reference to other statutes dealing with the same or a similar subject-matter. Hence the language of those statutes must be studied. The meaning attached to a particular expression in one statute, either by definition or by judicial decision, may be attached to it in another. And variation of language may be construed as indicating change of intention.

3. The general rule that special provisions will control general provisions.

4. The similar rule that where particular words are followed by general words (horse, cow, or other animal), the generality of the latter will be limited by reference to the former ("Eiusdem generis" rule).

5. The general rule, subject to important exceptions, that a guilty mind is an essential element in a breach of a criminal or penal law. It should, therefore, be considered whether the words "wilfully" or "knowingly" should be inserted, and whether, if not inserted, they would be implied, unless expressly negatived.

6. The presumption that the legislature does not intend any alteration in the rules or principles of the common law beyond what it expressly declares.

7. The presumption against any intention to contravene a rule of international law.

8. The presumption against the retrospective operation of a statute, subject to an exception as to enactments which affect only the practice and procedure of the courts.

9. The rule that a power conferred on a public authority may be construed as a duty imposed on that authority ("may" = "shall").

Let me add a few more rules, not rules of construction or interpretation, but maxims or cautions, which the draftsman may find useful.

Remember that a right or duty is incomplete without what is commonly called a sanction; that is to say, the evil which may attend a violation of the right or a breach of the duty. "For it is but lost labour," remarks Blackstone, "to say, 'Do this, or avoid that,' unless we also declare, 'This shall be the consequence of your noncompliance.'" The sanction may be either civil or criminal, or both. Where a civil sanction only is required, the courts will usually have power to apply the appropriate remedy, without express words. And the enactment should be so expressed as to give the right, not the remedy, to say that a person may do a particular thing, not that he may bring a particular action or obtain from the court a particular order. In some cases, however, it may be necessary to enlarge the jurisdiction of a particular kind of court, for the purpose of bringing the enforcement of a right or duty within that jurisdiction. And in other cases it may be necessary to devise or specify a particular form of remedy. But in such cases the details of procedure would, in England, be left to be regulated by rules of court. The rules as to the criminal sanction are different. If it is proposed by a bill to make an Act penal, then the criminal sanction should be imposed expressly by the bill, for it is not desirable to rely on the English doctrine that any breach of an Act of Parliament is a misdemeanour. Where a duty is imposed on a public authority, you should consider whether the duty is to be enforceable by the intervention of a superior

expressions are differently defined, and are given different meanings by the context. Hence alteration of language is necessary for the sake of clearness and consistency.

For all these reasons the work of consolidation can seldom be effected mechanically. The law has to be rewritten in such a form as to preserve its substance whilst altering its form. But care should be taken to preserve the material language unless there is any special reason for altering it, and specially to preserve, as far as possible, expressions on which a judicial construction has been placed or which have acquired a particular signification in practice.

It is, however, rarely possible to reproduce existing statute law without some slight alteration of substance. Ambiguities and inconsistencies have to be removed; modern machinery has to be substituted for machinery which has become obsolete or inconvenient. Alterations of this kind may properly be described as necessarily incidental to the process of consolidation; and, if their nature is fully and fairly explained, objection will probably not be raised on the ground that the measure goes beyond the proper scope of consolidation. Every consolidation bill should, therefore, be accompanied by a memorandum and notes on clauses showing what alterations of this kind are made by the bill.

In order to make sure that the existing enactments have been fully reproduced, and that nothing has been overlooked, a reference to each section reproduced should be given on the margin of each reproducing clause, and there should also be a separate table of the enactments repealed and superseded, showing where each repealed section is reproduced, or, if it has not been reproduced, on what ground it has been omitted. There will thus be a double check on the accuracy of the consolidation. The marginal reference

will show whence the new law is derived; the table of comparison will show how the existing law is accounted for.

There is often difficulty in determining the boundary lines of a consolidation bill, in saying what enactments it should or should not reproduce. Each bill of this kind ought to be regarded as a chapter in an ideal code, and considered in its relations to kindred branches of the law. It should be considered, before a provision is inserted, whether it might not find a more appropriate place in another chapter; and before a provision is omitted, where else it could be better placed if kindred branches of the law were consolidated. But theoretical considerations of this kind must often give way to considerations of policy. It is frequently better to have incomplete consolidation than no consolidation at all, and to avoid enactments which it would be dangerous under existing circumstances to touch.

Legislation by reference is a favourite subject of invective with critics of parliamentary procedure. But the phrase has more than one meaning. In its widest sense it includes any reference in one statute to the contents of another. In a narrower sense it means the application, not by express re-enactment, but by reference, of the provisions of one statute to the purposes of another.

All legislation is obviously referential in the widest sense. No statute is completely intelligible as an isolated enactment. Every statute is a chapter, or a fragment of a chapter, of a body of law. It involves references, express or implied, to the rules of the common law, and to the provisions of other statutes bearing on the same subject. If the leading rules of the common law were codified, that is to say, expressed in a concise, orderly, and authoritative form; if the provisions of the statute law were consolidated, that

is to say, if the statutory provisions on each subject were collected and arranged in a single Act, — the outside knowledge required for the interpretation and application of particular Acts would be more easily acquired. But under existing conditions the complete effect of a short and apparently simple enactment often cannot be grasped without a careful search through textbooks and the statute book. The conservative character of English legislation increases the difficulty of this task. The English legal and administrative system is like an ancient and venerable building, which has been often repaired, altered, and enlarged, but has never been pulled down and rebuilt. There has been no revolutionary break with the past. When a new departure is resolved upon, it is usually made in a cautious and experimental fashion. The adoption of the experiment is made permissive in the first instance, or its application is confined to a limited area, to a particular trade or occupation, or to a restricted set of circumstances. The new rules are patched and altered as defects appear, the area of experiment is gradually enlarged, and it is not until the new law has been tested by adequate experience that its application is made general or compulsory. Until the new system has acquired a comparatively final form, until the difficulties raised by its introduction have subsided or been overcome, until it has been generally accepted as part of the settled law of the country, there is a natural indisposition to stir burning questions by proposing to repeal the existing enactments and fuse them into a new and comprehensive Act. And it must be admitted that the task of consolidation is often postponed after these grounds for delay have ceased to operate. These circumstances, coupled with an indifference to style and finish, characteristic also of English art and

English literature, are sufficient to explain the disorderly condition of the English statute book, which is so often made a subject of reproach by legislators and judges as well as by scientific writers on the law. But whilst the justice of their criticisms may be admitted, it must be borne in mind that the national characteristics which are responsible for these defects have much to do with the vitality and the efficacy of English institutions.

It follows that the English legislator rarely, if ever, finds himself in a position to inscribe a brand-new law on a blank sheet of paper. The utmost that he can usually aim at is to remove some blemish from, or to alter or add to some provisions of, an existing law or institution; in other words, to pass an amending Act. And the best mode of framing an amending Act, so as to be intelligible both to those who have to pass it and to those who have to administer it, is often a problem of considerable difficulty.

From the point of view of administration the most convenient plan is to repeal the old law, and re-enact it with the necessary modifications. But the law to be amended is often contained in more than one Act, and English experience tends to show that attempts to combine consolidation with substantial amendment are rarely successful. Even where there is only one Act that need be amended, a proposal to repeal the whole Act for the purpose of making a single amendment, or two or three amendments of minor importance, is open to many objections. It gives the proposed legislation an appearance of being more important and more extensive in its scope than it really is, and the prudent legislator will usually prefer to minimize rather than magnify his proposals. It obscures, and distracts the attention of the legislature from, the immediate point or points in issue.

It throws the whole law into the crucible, exposes to amendment, not merely the particular provisions which the introducer of the bill desires to alter, but all other provisions of the law which appear to be in any way open to criticism, and consequently multiplies the points of attack and the obstacles to progress in a committee of the House. The proposal to repeal and re-enact, not the whole of an Act, but merely a particular section of an Act, is often open to similar objections from a parliamentary point of view. For the section may embody a principle, or may contain provisions, which the introducer of the bill does not desire to question, but which cannot escape criticism if the whole section is proposed for repeal.

In some cases, also, the law embodied in the new enactment is intended to apply only to events and transactions happening after a particular date, leaving events and transactions happening before that date to be governed by the old law, and in such cases, if the old law is repealed, it is often not easy to express the precise operation of the law with respect to occurrences at different dates.

For all or some of these reasons the promoter of an amending measure usually has to content himself with altering the form or substance of existing sections, or adding sections to an existing Act.

If, for any of these reasons, the method of repeal or re-enactment is not adopted, the next most convenient course, from the point of view of administration, is to express the amendments in a technical form, like notices of amendments to bills in Parliament, or like errata or addenda in books; that is to say, in the form of directions to strike out particular words or sentences from an enactment, and to add others. This is the form frequently adopted by the

Indian legislatures. It has considerable advantages. It enables a clerk to note up, almost mechanically, the alterations in the statute law, by simply striking out or writing in the necessary words. Thanks to this method of amendment, the Legislative Department of the government of India is able to issue periodically revised editions of the most important Indian Acts, which embody the amendments up to date, and thus, for many purposes, take the place of repealing and consolidating Acts. The substitution is not completely satisfactory, partly because it is always necessary to bear in mind the date from which the new enactments incorporated in the old law began to operate, and partly because, for this and other reasons, if a case on the amended Act comes into court, the judge or magistrate often finds it necessary to inspect the original Acts instead of relying on the reprint. But for purposes of practical administration such reprints are of great convenience.

On the other hand, from the point of view of English parliamentary procedure, an amending bill drawn in the technical form adopted by the Indian legislature is open to serious objections. In the first place, it is absolutely unintelligible without the text of the enactments which it is proposed to emend, and even if these objections can be removed by means of an explanatory memorandum, a bill thus drawn is, as any one who has watched attempts to frame parliamentary amendments will readily understand, extremely difficult to amend, and thus presents unreasonable obstacles to legitimate discussion in committee. For these reasons this technical method of amendment is hardly ever adopted in England except in the case of non-contentious measures.

In these circumstances, the ordinary mode of amending

an Act is to state in the amending bill the effect of the amendment proposed to be made. This is the commonest mode, and for English parliamentary purposes is the most convenient, because under it every member of Parliament who knows anything of the subject learns at once the nature of the amendment proposed. And in some cases, where the amendment virtually overrides a large portion of the existing enactment, it is practically the only possible method.

There are cases in which it may be possible to combine what may be called the popular and the technical mode of amendment, by stating at the beginning of a clause the substance of the amendment proposed to be made, and adding, in a separate subsection or otherwise, technical amendments, which make the requisite alterations in the language of the enactment amended.

You will have seen from what I have said that the great bulk of legislation in England, and I should think probably in the United States also, is amending legislation, and that all amending legislation is referential in the sense that it is unintelligible without reference to other enactments.

But by referential legislation in the narrower sense is meant legislation of which the object is, not to amend an existing enactment, but to apply its provisions to a new set of circumstances, and that is the form of legislation which in England has been most criticised and abused.

There is an obvious case in which this mode of legislation is clearly legitimate and appropriate. The case is that of Acts which have been drawn for the express purpose of being applied to other enactments. In England the most conspicuous case of such Acts is supplied by the Clauses Consolidation Acts of 1845. The development of railway and joint-stock enterprises in the third and fourth decades

of the nineteenth century gave rise to a vast number of private Acts, each containing provisions closely resembling, and often copied from, each other. With the view of reducing the length of these Acts and of securing greater uniformity in their provisions, Mr. Booth, when counsel to the Speaker of the House of Commons, drew a set of Acts "for the purpose of consolidating in one Act certain provisions usually contained in" the special Acts relating to the formation of companies, the taking of land, and the construction of railways. These Acts have no independent legislative force of their own, but are statutory 'common forms,' required, either by the terms of the Act itself, or by the standing orders of Parliament, to be "incorporated" in future Acts. They have been of great use in securing uniformity in private bill legislation, and in saving the time of Parliament. But it would probably have been better if they had been enacted in the form of substantive law, with provisions for allowing their modification by special legislation in proper cases.

Incorporation of the Clauses Acts is a method of legislation directly contemplated when those Acts were passed. But a further step is taken when an enactment is applied to circumstances different from those contemplated when it was passed. This method of legislation, of which I gave an illustration in an earlier chapter,[1] sometimes presents advantages from an administrative point of view, but is often forced upon the draftsman by the pressure of political and parliamentary exigencies, and has, no doubt, in some cases been carried a great deal too far.

Perhaps the best defence of it is that probably every one who was concerned with the passing of the Acts in which it was employed would hold that no other method could have

[1] See above, p. 20.

been adopted with any prospect of success. The method rarely, if ever, saves the draftsman any trouble, for the work of framing modifications of the enactments applied requires extreme care, and is often a matter of great difficulty. Under the pressure of superior authority the draftsman labours to be brief. It is no marvel that he is sometimes obscure.

The conclusion seems to be that, in English legislation at all events, the method of legislation by reference is in some cases unavoidable, but that where it has been adopted, the proper course is to throw the law, as soon as practicable, into a simpler and more intelligible form by passing a measure of consolidation.

There are two forms of English legislation on which I have touched, very lightly, in previous chapters, but on which it is now necessary to say something more. These are, first, private bills and provisional order bills, and, secondly, that form of subordinate or delegated legislation which takes the form of what we call statutory rules and orders.

And first of private bill legislation: I believe that you do not make the same distinction, at all events not the same kind of distinction, that we make between public bills and private bills.

The object of a public bill, according to our system of nomenclature, is to alter the general law.

The subjects with which English private bills ordinarily deal appear from the headings given in the first of the standing orders of our House of Commons relating to private business. Those headings are as follows: —

1st Class:

Burial Ground, Making, Maintaining or Altering.
Charters and Corporations, Enlarging or Altering Powers of.
Church or Chapel, Building, Enlarging, Repairing or Maintaining.

City or Town, Paving, Lighting, Watching, Cleansing or Improving.
Company, Incorporating, Regulating, or giving Powers to.
County Rate.
County or Shire Hall, Court House.
Crown, Church, or Corporation Property, or Property held in Trust for Public or Charitable Purposes.
Electricity Supply.
Ferry, where no work is to be executed.
Fishery, Making, Maintaining or Improving.
Gaol or House of Correction.
Gas Work.
Improvement Charge, unless proposed in connection with a Second Class Work to be authorised by the Bill.
Land, Inclosing, Draining or Improving.
Letters Patent.
Local Court, Constituting.
Market or Market Place, Erecting, Improving, Repairing, Maintaining or Regulating.
Pilotage.
Police.
Poor, Maintaining or Employing.
Poor Rate.
Powers to sue and be sued, Conferring.
Stipendiary Magistrate, or any Public Officer, Payment of.
Trolley vehicle system.

And

Continuing or amending an Act passed for any of the purposes included in this or the Second Class, where no further work than such as was authorised by a former Act is proposed to be made.

2d Class:

Making, Maintaining, Varying, Extending or Enlarging any
Aqueduct.
Archway.
Bridge.
Canal.
Cut.
Dock.

Drainage — where it is not provided in the Bill that the Cut shall not be more than Eleven feet wide at the bottom.
Embankment for reclaiming Land from the Sea or any Tidal River.
Ferry, where any work is to be executed.
Harbour.
Motor Road.
Navigation.
Pier.
Port.
Public Carriage Road.
Railway.
Reservoir.
Sewer.
Street.
Subway.
Tramway.
Tramroad.
Tunnel.
Waterwork.

You will see that this class of bills deals mainly with the grant and regulation of what you would call franchises. For instance, a railway bill is a typical private bill. And here I ought to clear away some confusions which are apt to arise from our nomenclature and classification of bills and Acts.

In the first place, a private bill is quite a different thing from a private member's bill. What we mean, when we speak of a private member's bill, is merely a bill introduced by a private member as distinguished from a member of the government. It may be either a public or a private bill.

In the next place, the great bulk of private bills, when they become law, are classified in the statute book as local and personal acts, the term "private Act" being confined to a very small class dealing solely with the rights of individuals,

such as estate Acts and the like. Therefore the title "private bill" covers a much wider field than the title "private Act."

As to the form of private bills, it is left very much to the promoters of the bills, and to those with whom they may have to make terms of compromise. But a general supervision over them is exercised by legal officers attached to the two Houses of Parliament, the counsel to the Lord Chairman of Committees in the House of Lords, and the counsel to the Speaker of the House of Commons, and these gentlemen have prepared model forms for the guidance of promoters of such bills.

Between the procedure for passing public bills and the procedure for passing private bills there are material differences. A private bill is initiated by petition, and fees, pretty heavy fees, are paid at the several stages of its passage through Parliament. It is regarded as a *privilegium*, for which a price should be paid to the State. Then our standing orders require notices to be given to persons whose private interests may be affected, in order that they may have an opportunity of asserting and protecting their rights when the bill comes on for discussion, and the two Houses appoint officers, called examiners of petitions for private bills, for the purpose of seeing that these standing orders are observed. The first reading of a private bill is purely formal. The second reading takes place in the House at the time reserved for private business. The second reading is rarely debated, except when the bill raises, or is alleged to raise, some question of general principle. After second reading the bill goes before a small committee of four members, or, in the case of unopposed bills, five members. This committee deals with the bill judicially, hears counsel and witnesses, considers

and determines whether the preamble is proved, and settles the form which the clauses are to assume.

I should add, and this is important, that when a private bill, promoted by a municipal or other local authority, proposes to create powers relating to police, sanitary, or other local regulations in conflict with, deviation from, or excess of, the general law, it goes to a special committee which is charged with the difficult duty of considering how far and in what cases rules and principles of general law ought to be superseded or modified by local legislation. Whether a private bill goes before the local legislation committee or not, it is reported in due course to the House by the committee which has considered it, and in the House, at the time allotted for private business, it goes through the final stages called consideration of report and third reading.

You may gather from what I have said that the procedure for passing a private bill is elaborate, and, I may add, expensive. The great time in England for private bill legislation was during the railway boom of the forties and fifties in the last century. Since that boom, though the local and personal Acts of each session still fill many volumes, there has been a great diminution in the bulk and volume of private bill legislation. That diminution may, I think, be traced mainly to three causes. In the first place, all our great railway lines have been built, and the numerous companies by which they were constructed have been absorbed by, or amalgamated with, a comparatively small number of big companies. In the next place a great many matters which used to be dealt with by special legislation are now regulated by, or under powers conferred by, general legislation. For instance, the vast majority of companies are now incorporated, not by special Act, but by a license from

the Board of Trade under the general Companies Act. And many of the provisions which formerly used to appear in local Acts are now to be found in the general Public Health Acts. These are two out of a very large number of cases in which local, and, as it may be called, experimental legislation has, in the natural course of things, been superseded by general legislation.

Thirdly and lastly, the expensive process of private bill legislation has, in a great many cases, been superseded by provisional order legislation. The object of a provisional order is usually to provide a means of obtaining Parliamentary sanction for the execution of works, or the carrying out of administrative arrangements, which are incidental to the administration of a public general Act, but for which the authority of a special Act, that is to say, of a private bill destined to become a local or personal Act, would ordinarily be required. The machinery of provisional orders was, I believe, first applied by one of our Public Health Acts, for the purpose of giving powers to obtain land required by sanitary authorities, and was worked by the Local Government Board, which is the central authority under these Acts. But the system has since been extended to many other purposes, and is worked by several other central departments besides the Local Government Board. The cases in which it is most frequently employed are those in which the carrying into effect of a public general Act involves interference with private or public rights. The way in which it is ordinarily worked is this. The local authority or other body concerned makes an application to the proper central authority, such as the Local Government Board, or the Board of Trade, or the Board of Education, for an order embodying the powers and provisions needed. The central

authority makes a draft order, sends out notices, and holds a local inquiry at which objections are heard and considered. When this order is finally approved by the department which is the central authority, that department schedules it, either alone or with other orders, to a confirming bill, which is introduced into the House by the minister representing the department. The confirming bill is technically a public bill, but is introduced and passes through its subsequent stages in the House at the time allotted for private business. If, while the bill is pending in either House, a petition is presented against any order proposed to be confirmed by it, the bill is treated as if it were an opposed private bill, and goes before a small committee. But in other cases the preliminary departmental inquiry takes the place of the costly inquiry before a parliamentary committee. And in any case, the promoters are absolved from payment of the fees required for the passage of local and personal Acts. This procedure saves a great deal of expense and a great deal of parliamentary time, and has been very largely adopted in recent times. Such departments as the Local Government Board and the Board of Trade pass through Parliament in each session a great many Provisional Order Confirmation Bills, often with several orders attached to them. The bills confirming these orders, when they become Acts, are to be found, not among the Public General Acts of the session, but among the Local and Personal Acts, with which they have most affinity.[1]

The provisional order system which I have described re-

[1] Among notable extensions of the provisional order method of legislation in recent times are a Marriage Act, which enables technical invalidities in marriages to be cured by provisional orders instead of by special Acts, and a Trade Boards Act, under which the operation of the Act can be extended by provisional order to trades other than those to which it was originally applied.

lieves the work of the legislature by placing at a preliminary stage the task of hearing and considering objections to proposed legislation by means of an inquiry held under the supervision, not of the legislature, but of a department of the executive government. It authorises that department to make an order which has only provisional effect; that is to say, which does not operate as law, until it has been expressly confirmed by the legislature, and reserves to the legislature the power to pass an Act confirming these orders.

The system of statutory rules and orders goes a step further in the direction of delegating legislative work to the executive government, by empowering the executive to make rules and orders which do not require express confirmation by Parliament, although they are in some cases subject to disallowance by that body.

These rules and orders represent a class of legislation which is of great and growing importance in England, which, in somewhat different form and in pursuance of somewhat different principles, is of still greater importance on the continent of Europe, but to which there is, possibly, no precise parallel in the United States. They stand on the debateable border land between legislative and executive action, and it may be that, owing to the limitations on the powers of your legislatures, and to the way in which you draw the line between legislative and executive functions, they cannot be used in the same way or to the same extent as in England. On that point I should be glad to have further information. But their existence and the power to make them exercise such a material influence on the form of modern English legislation that I feel bound to say something about them. In most cases, for the line is not always easy to draw, they would probably be described as laws, general laws, not particular

executive orders. They derive their authority from the legislature. But the legislature does not make them. What it does is to delegate the power to make them to some other person or body, usually to some executive authority. That is why they stand, as I have said, on the borderland between legislative and executive action.[1]

In France and Germany, and on the continent of Europe generally, much greater use is made than in England of the power of the executive government to supplement parliamentary legislation by means of rules or orders having the effect of law. And these rules or orders are made, sometimes under powers delegated by the legislature, but sometimes also under powers given to the executive by the constitution, or supposed to be inherent in the Crown or other representative of the executive authority.

In Germany a distinction is drawn between *Gesetz* and *Verordnung*, between a law formally enacted by the legislature and a general command lawfully proceeding from the executive authority.[2]

In France there is power to supplement laws by decrees. This power, which is very extensively exercised, has come down from the old régime, and was never more fully used than by the first Napoleon, whose views about the powers and functions of legislatures differed widely from those held in the United States. You may probably have heard of the famous French constitution of the Year VIII, which emanated from the brain of Siéyès, which was so altered by Napoleon Bonaparte as to make it serve his own purposes and defeat those of the author, and under which Bonaparte

[1] The procedure in English Courts of Law is almost entirely regulated, not by the provisions of statutes, but by rules of court framed by experts acting under statutory authority.

[2] See Jellinek, *Gesetz und Verordnung*.

became First and Cambacérès Second Consul. This constitution was expressed in very general terms, and, as finally drafted, left many points to be worked out in practice, and perhaps, as I may observe parenthetically, was none the worse for that. Under this constitution the Council of State was charged with the duty of framing laws, the tribunes with the duty of discussing and criticising the draft of a law, the legislature with the duty of deciding by vote, but without debate, whether it should or should not become a law. "But what is a law?" Bonaparte asked Cambacérès, in the early days of the constitution. "What must be settled by law, and how much can we, the Consuls, do by *réglements* in our Council of State, without calling in the aid of the legislature?" Cambacérès' answer was discreetly oracular: "A *réglement* is only the particular application of the law. Law is the general rule made by those who have the right and power to make it." Bonaparte smiled and did not press his question further. He kept this sibylline utterance and pondered it in his heart, and in the later days of the Empire he made it the foundation of, and justification for, his extensive legislation by decrees. If the extent to which decrees can be made is left to the discretion of the executive, the power is capable of indefinite extension. The spirit of the constitution of the Year VIII still breathes in the French constitutions of later dates, and in the other European constitutions modelled on or suggested by those of France. Under all these constitutions the executive government has, and freely exercises, an inherent power of making decrees, *réglements*, and similar orders and regulations which supplement the action of the legislature. For instance, if you take up such a volume as the *Annuaire* of French legislation, published by the French Society of Com-

parative Legislation, you will find a large amount of space occupied by decrees ranking alongside of ordinary laws.

In Italy the power of the executive officials to make regulations is even more extensively used. The constitution declares that "the King makes the decrees and regulations necessary for the execution of the laws without suspending their observance or dispensing with them." But the interpretation put upon this provision is so broad that the government is practically allowed to suspend a law subject to responsibility to Parliament, and even to make temporary laws which are submitted to Parliament later. And Parliament uses very freely the power of delegating legislative power to the ministers. In the case of the recent Criminal Code for Italy, the final text was never submitted to the Chambers at all, but, after the subject had been sufficiently debated, the government was authorised to make a complete draft of the code, and then to enact it by royal decrees, harmonising it with itself and with other statutes, and taking into account the views expressed by the Chambers. The same was true of the electoral law of 1882, of the recent laws on local government and on the Council of State, and of many other enactments. Without express power for the purpose, the minister, prefects, syndics, or other officials are in the habit of making decrees on subjects of minor importance.[1]

Now in England the power of the Crown to make laws without the consent of Parliament has long since disappeared, or, to be strictly accurate, has been so reduced as to be infinitesimally small. So wide an extension of the delegation of legislative powers as is practised in France and Italy would not be tolerated in England.

As to the past, I must not be tempted to stray into the

[1] See Lowell, *Governments and Parties in Continental Europe*, Vol. I, p. 165.

region of English constitutional history. All that I need do is to remind you that in the earlier stages of parliamentary development the border line between laws made by the King in the exercise of the royal prerogative, between charters, ordinances, and orders in Council, on the one hand, and Acts of Parliament on the other, was not definitely drawn, but that the tendency, especially in Lancastrian times, always was to narrow the range within which legislative or quasi-legislative action could be exercised by the Crown. When the Tudor dynasty came to the throne, the legislative as well as the executive powers of the Crown were materially strengthened. Henry VIII was a monarch who entertained views about the functions of the legislature not unlike those of the first Napoleon. He held that Parliament ought not to be a master, but could be made a very useful servant. And he discovered — this was his great feat in the craft of statesmanship — he discovered how to use it. He treated Parliament not as an enemy or as a rival, but as an instrument. He found that it was a very useful instrument if it could be persuaded to play the right tune, and he took good care always to call the tune. He accepted his predecessor Henry VII's principles that the King should rule through Parliament, but worked that principle in an entirely different way. He made Parliament the engine of his will. He persuaded or frightened it into doing anything that he pleased. Under his guidance Parliament defied and crushed all other powers, spiritual and temporal, and did things which no King or Parliament had ever attempted to do, things unheard of and terrible. And, not content with this, he took a step further, and in the year 1539, when he had been 30 years on the throne, he persuaded Parliament to pass the Statute of Proclamations which gave the King power to legislate by

proclamation. If this innovation could have been maintained, it would have revolutionised the character of English legislation, and would probably have introduced the system of legislation by orders and decrees, which now prevails on the continent of Europe. But the Statute of Proclamations was repealed in the next reign and was never revived, and in 1610, in the reign of James I, a protest of the judges "established (I am quoting from Professor Dicey) the modern English doctrine that royal proclamations have in no sense the force of law; they serve to call the attention of the public to the law, but they cannot of themselves impose upon any man any legal obligation or duty not imposed by Act of Parliament." [1] So it was gradually recognised that a law made by the authority of Parliament could not be altered except by the same authority. And, as the number of Acts of Parliament and of the subjects with which they dealt increased, the legislative sphere of the royal prerogative was proportionately diminished, and has now been reduced within very narrow dimensions.

Thus the inherent or residuary power of the Crown or of the executive government to make decrees, rules, orders, or regulations having the force of law, a power which is so largely exercised on the continent of Europe, has disappeared in England.

In recent years, however, what may be called the legislative powers of the executive have been revived and extended. A large and increasing number of modern Acts of Parliament contain provisions giving power to regulate specified matters by orders in Council, that is to say, by orders made by the King in Council at the instance of some department of the executive government, or by what are

[1] *Law of the Constitution* (7th ed.), p. 48.

now called collectively statutory rules and orders, that is to say, rules and orders made by some department of the government under powers specifically delegated to it by Parliament. The adoption of these methods has been rendered necessary by the great quantity of administrative legislation which has been the characteristic feature of parliamentary history since the Reform Act of 1832. It is the increasing complexity of modern administration and the increasing difficulty of passing complicated measures through the ordeal of parliamentary discussion, that have led to the increase in the practice of delegating legislative power to executive authorities. This practice has materially affected the form of modern English statutes. The tendency of modern parliamentary legislation in England has been in the direction of placing in the body of an Act merely a few broad general rules or statements of principles and relegating details either to the schedules or statutory rules. I say that this is the general tendency, but it is a tendency which is regarded in England with much jealousy, legitimate jealousy, and the operation of which requires to be carefully watched.

As to schedules, a schedule is merely part of an Act, and, unless it is made alterable by executive authority, the question whether a provision or set of provisions should appear in the body of an Act or in a schedule, is a question of form and parliamentary practice.

But the question whether a particular rule ought to be embodied in an Act or left to be made by a subordinate authority, the question whether, to what extent, and under what safeguards and restrictions, the exercise of legislative power should be delegated, is a question of principle.

I have spoken to you about the extent to which the delegation of legislative power is carried on the European con-

tinent, and I have said that so extensive a delegation of legislative powers would not be tolerated in England.

The ordinary Englishman, as represented by the average member of Parliament, finds some difficulty in assenting to the proposition laid down by an eminent author[1] that "the substance no less than the form of the law would, it is probable, be a good deal improved if the executive government of England could, like that of France, by means of decrees, ordinances, or proclamations having the force of law, work out the detailed application of the general principles embodied in the Acts of the legislature." If his liberty of action is to be subjected to restraint, he prefers that the restraint should be imposed by laws which have been made after public discussion in a representative assembly. He readily admits that the application of a different principle is in accordance with the habits and traditions of Continental countries, and is necessary in countries like India, but he dislikes its application at home. Therefore, although he acknowledges the impossibility of providing for every detail in an Act of Parliament, and the consequent necessity of leaving minor matters to be regulated by statutory rules or by executive discretion, he scrutinises with a jealous eye provisions which delegate the power to make such rules or which leave room for the exercise of such discretion, and insists that they should be carefully expressed and limited, and be hedged round with due safeguards against abuse. A great deal of this jealousy is a survival from an older state of things, for it must be remembered that in a country like modern England public opinion is the most effectual, and is usually a sufficient, safeguard against any serious abuse of statutory powers. Moreover, I doubt whether the control

[1] Dicey, *Law of the Constitution* (7th ed.), p. 50.

of Parliament over the details of legislation and administration is less effective in the present day than it was in days when Acts of Parliament were more minute in their provisions. For instance, a reference to Hansard's reports of parliamentary debates will show that down to a comparatively recent date the number of the members who took part in a legislative debate, and the number of the amendments moved, were far smaller than it is now, and that there was a much greater readiness to take long and complicated measures on trust, and to accept them without examination of details. These considerations are of great weight and supply a sound argument for justifying the modern practice of delegating power to legislate on matters of minor importance. It is, indeed, the increased vigilance and intelligence of members and their constituents which has increased the difficulty of passing legislative measures through Parliament, and has rendered necessary the adoption of various expedients for shortening and simplifying their form, expedients of which the delegation of legislative powers is among the most legitimate. But, unless the temper of Parliament should materially change, attempts to give delegated powers in unduly wide terms, or to extend them beyond matters of minor importance, or to strain their exercise, might produce a reaction which would have a mischievous and embarrassing effect on the form of parliamentary legislation. If, however, the delegation of legislative powers is kept within due limits and accompanied by due safeguards, it facilitates both discussion and administration.

It facilitates discussion because it concentrates attention on the main questions, and prevents waste of time on minor and subordinate issues. It facilitates administration because every administrative change is in the nature of an

experiment. The precise mode in which the change will work out, the exact means by which its object can best be effected, cannot be determined with certainty beforehand, and consequently the machinery must be made elastic. This elasticity can best be given by allowing the details to be worked out on the general lines laid down by the supreme legislature, either by statutory rules or by official practice, subject to the check of public opinion and questions in Parliament.

As I have said, public opinion is, in a country like modern England, a very powerful safeguard against any serious abuse of statutory powers.

Under our parliamentary system any exercise of executive action by the government (and the making of rules and orders is such an exercise) may be made the subject of questions in Parliament (the notice paper of the House of Commons swarms with questions of this kind) or may be discussed and debated on the vote for what you would call the appropriations required for the expenditure of the department concerned. A minimum number of days is set apart in each session for the discussion of these votes in committee of supply, — one of the committees of the whole House, — and any abuse or wrongful exercise of these powers might bring about a vote of censure and downfall of the government. Therefore, the ordinary right of parliamentary criticism is a great safeguard against the abuse of delegated legislative powers. But in many cases further safeguards against secret, arbitrary, or oppressive action are expressly provided. In some cases the department which makes a rule or order is required to publish a preliminary draft for general criticism. This obligation is imposed by a general Act called the Rules Publication Act, 1893, in the

classes of cases to which that Act applies. Usually statutory rules and orders are expressly required by the Act which authorises their making to be laid upon the table of each House of Parliament, and are thus made parliamentary papers, and so brought to the knowledge of members of Parliament and others. Very often they are expressly made subject to disallowance by resolution of either House, if that resolution is passed within a limited time. The form of control reserved by the legislature varies in different cases, and is a frequent topic of debate when bills proposing to delegate legislative powers are under discussion in Parliament.

Until a recent date a very real and formidable objection to this method of delegating legislative powers lay in the difficulty of knowing where the rules and orders made under the delegated powers were to be found, and sometimes in the difficulty of obtaining copies of them. The provision made for the due publication of this branch of law was extremely insufficient and unsatisfactory. But this has now been met, and, I think, satisfactorily met. Under arrangements which came into force in 1890 the statutory rules and orders of each year are now officially published in a form corresponding to that of the annual statutes, an index to them is periodically revised and published, and a complete collection of the statutory rules and orders for the time being in force, corresponding to the edition of the revised statutes, is also periodically revised, edited, and published by official authority.

VIII

CODIFICATION

It is now time that I should say something about codification, using the term in its stricter sense, as distinguished from the consolidation of statute law. I said in an earlier chapter that codification in this stricter sense might be described as the reduction into systematic form of the whole of the law, whether statute law or common law, relating to a given subject. But I should like this to be taken as a provisional description, subject to the qualifications to which I shall refer hereafter about the possibility of codifying the whole of any given branch of law. I said also that codification stands in a different category from the humbler and more modest processes of improving the statute law by indexing, expurgation, revision, and consolidation, because, from the English point of view, it represents rather an ideal to be arrived at than a programme likely to be realised, at all events in the near future. But, just because codification is an ideal to be aimed at, its meaning and objects ought to be understood by the draftsman of statutes. For he ought to think of each enactment as a chapter, or a fragment of a chapter, of an ideal code, and consider it in its relations to the whole branch of law with which it is cognate.

Now codification is a vast subject, and a portentous amount of literature has been devoted to it. I must content myself with touching lightly on one or two of its aspects, and must confine myself to codification as practised or

attempted in modern times. Let me put two or three questions. What are the objects at which codification should aim? What has actually been done, in modern times, in different countries towards codifying the law, or important branches of the law? What have been the chief motive forces which have enabled modern legislatures to achieve the objects of codification and to surmount its difficulties? Why have these difficulties been surmounted in some countries and not in others? What advantages may be claimed for codification as actually carried out in recent times?

The word codification, as distinguished from the theory, was invented by Bentham, who was, as I have said, a great coiner of words. So we are entitled to ask Bentham what meaning he himself attached to the term, and I will give his answer as nearly as possible in his own language. His answer is to be found in his *General View of a Complete Code of Laws.*

"The object of a code is that every one may consult the law of which he stands in need, in the least possible time. 'Citizen,' says the legislator, 'what is your condition? Are you a father? Open the chapter "Of Fathers." Are you an agriculturist? Consult the chapter "Of Agriculture."'. . . A complete digest, such is the first rule. Whatever is not in the code of laws ought not to be law. . . . The great utility of a code of laws is to cause the debates of lawyers and the bad laws of former times to be forgotten. . . . Its style should be characterised by force, harmony, and nobleness. With this view, the legislator might sprinkle here and there moral sentences, provided they were very short, and in accordance with the subject, and he would not do ill if he were to allow marks of his paternal tenderness to flow down upon his paper, as proof of the benevolence which guides his pen. . . . A code framed upon these principles would not require

schools for its explanation, would not require casuists to unravel its subtleties. It would speak a language familiar to everybody; each one might consult it at his need. It would be distinguished from all other books by its greater simplicity and clearness. The father of a family, without assistance, might take it in his hand and teach it to his children, and give to the precepts of private morality the force and dignity of public morals. The code having been prepared, the introduction of all unwritten law should be forbidden. Judges should not make new law. Commentaries, if written, should not be cited. . . . If a judge or advocate thinks he sees an error or omission, let him certify his opinion to the legislature, with the reasons of his opinion and the correction he would propose. . . . Finally, once in a hundred years, let the laws be revised for the sake of changing such terms and expressions as by that time may have become obsolete."

In short, the code was to be complete and self-sufficing, and was not to be developed, supplemented, or modified except by legislative enactment.

These views were characteristic of the age in which Bentham wrote. It was an age of great ideals. It underrated the difficulties of carrying them into execution. It overrated the powers of government. It broke violently with the past. It was deficient in the sense of the importance of history and of historical knowledge. It aimed at finality, and made insufficient allowance for the operation of natural growth and change. It forgot Bacon's maxim that *subtilitas naturae subtilitatem artis multis partibus superat.* It ignored or underestimated differences caused by race, climate, religion, physical, social, and economic conditions.

Bentham's views as to what could or should be achieved by codification have long since been, if not abandoned, at

least materially modified. We are all now agreed that a good code must often — perhaps should always — content itself with the statement of general principles, that, however complete and full it may be, it can never supply rules applicable by an ordinary intellect to every possible case, that the work of interpreting the law and of applying its general rules to particular cases must be left to the judges, that the sound interpretation of legal definitions and legal rules requires a knowledge of legal history, and that the exercise of the power of interpretation and application necessarily involves the formulation of subordinate and supplemental rules.

I now come to my next question: What has been done within recent times, say since the beginning of the last century, in different countries, in the way of codifying the law, or any important branches of the law, on the principles now generally accepted as applicable to codification? With this question I can only deal in a very short and summary manner.

In the beginning of the last century, France led the way, gave the impetus, and supplied the models for codification, by passing the famous *Codes Napoleon*, the five codes of which the *Code Civil* is the best known and the most important. Among the countries which have either adopted the French Civil Code, or have taken it as a model, are Belgium, Holland, Italy, Spain, and Portugal, on the continent of Europe, besides Mexico and Chili, on this side of the Atlantic, and Japan in the far East. Germany, working on independent lines, produced a Civil Code in 1896, after a period of gestation of twenty years, and brought it into operation in 1900. Switzerland passed an admirable law of obligations in 1883, and enacted a general Civil Code in 1907.

Within the British dominions, British India has led the way in codification, and the Indian Codes are well known and have exercised extensive influence. The self-governing dominions of the British Empire and her colonies have not made such rapid progress with codification as British India, but are in some respects in advance of the mother country.

In the United Kingdom codification of the common law has made very little progress. Only four codifying Acts have been passed by the Parliament at Westminster. They are the Bills of Exchange Act of 1882, the Partnership Act of 1890, the Sale of Goods Act of 1893, and the Marine Insurance Act of 1906. Of these the Partnership Act was drawn by Sir Frederick Pollock, the others by Sir Mackenzie Chalmers. All of them are excellent specimens of codification, but they deal only with special subjects and cover a small extent of ground.

About the progress and prospects of codification in the United States, and about the way in which your codes work, and the advantages derived from their enactment, it is for you to teach me and for me to learn. What I knew on the subject in 1901 is to be found in a book of mine that was published in that year. But my knowledge was very incomplete, and I should be grateful to anyone who would help me by supplementing my information and correcting my errors.

Now, why is it that in England codification on the more extensive and ambitious scale has made no way, is making no way, and has practically no effective body of public or professional opinion to move it on, whilst in countries like France and Germany it is not only a success, but a popular success? I am confining myself to the old world because I know too little about the forces which make for and against codification in the United States to be able to generalise

about them. And I select France and Germany because they are two great countries which have pursued, and achieve the same object by independent routes.

I believe that it was the pressure of practical needs that mainly brought about the enactment of great codes in France and Germany, and that it was the presence and pressure of these needs there, and their absence in England, that mainly account for the success of codification in those two countries and the failure to create anything more than a languid interest in the subject in England. And of those practical needs that which was felt most strongly was the need for unification of the law. It was the strong desire to unify the substance of law, not the desire to improve its form — never, I fear, a very strong, effective, or operative motive with legislatures — it was the sense of the practical inconveniences arising from diversities of law that successfully surmounted the difficulties which stand in the way of codification.

Let me support and illustrate this statement by reminding you of the causes which, as a matter of history, led up to the enactment of the great French Codes at the beginning of the last century, and the enactment of the great German Code at its end.

The French Civil Code celebrated its centenary rather more than nine years ago — I went over to Paris to attend the celebration — and its centenary produced a set of very interesting studies upon the Code by eminent men, studies on its origin, its working, its interpretation, its influence on the development of French law, its influence on the legislation of other countries, and many other cognate matters. The two volumes which contain these studies are entitled *Code Civil — Livre du Centénaire*, and are well worth the attention of those who care about the subject of codification.

We associate the Civil Code with the name of Napoleon, and we do so rightly because of the prominent part which he played in its passage into law. But the Code really was, like Napoleon himself, a child of the French Revolution of 1789.

Consider then the condition of French law in 1789. Instead of one civil code for the whole country, there were at least 360 local codes of civil law, some applying to a whole province, some to a much smaller district. The whole country was divided almost equally into two great legal regions; the region of the written law, based on the Roman law of Theodosius and Justinian, and the region of customary law. Each of these two systems of law was compatible with local diversities, but each of them had its common and distinctive features. The written law was more authoritative and individualist; the customary law was more humane and sociable. Both of them were supplemented, modified, or contradicted by three other general systems of law; the feudal law, which recognised two separate classes of blood with consequential distinctions of personal rights; the canon law, which exercised a preponderating influence on many parts of the law of persons, especially on the law of marriage; and the royal ordinances, which cut into the common law as statute law cuts into common law in England and in this country. All these laws were modified by local usages expounded by voluminous commentaries, and interpreted by conflicting and varying decisions of numerous courts.

This was the state of things with which the revolution of 1789 was confronted. But here, as in other cases, the Revolution merely set loose, or gave an impulse to, forces which had long been at work. The unity of French law had been the dream of French kings from the time of Louis XI, if

not from the time of St. Louis. Two factors made for unity: in the South the principles of the Roman law tended to supersede local customs; in the North the custom of Paris tended to supplant other customs. Under Charles VIII and Louis XII vigorous and systematic efforts were made to digest the customary law, and by the end of the sixteenth century the customs of all the provinces had been reduced to a written and authoritative form. From the twelfth to the seventeenth centuries the French law was being frequently altered by royal ordinances; but these ordinances answered to our amending Acts, and whilst they might improve the substance of the law, they did not necessarily make it more simple or uniform. The ordinances of Louis XIV and Louis XV, which were associated with the names of Colbert and D'Aguesseau, were of a different character. They were codes. They were framed by learned commissions, presented in a complete and systematic form the whole of a particular branch of the law, and extended to the whole of the country. They were the immediate predecessors of the Napoleonic Codes, and to a great extent suggested their form and supplied their materials.

Throughout the eighteenth century almost all enlightened opinion in France — Montesquieu was an exception — was strongly in favour of unifying French law. Pothier was formulating and arranging its principles, and expressing them in terms capable of being transferred bodily into the codes of the future. It has been said that three-fourths of the Civil Code of 1804 was extracted from his treatises. Everything pointed in the direction of the Codes, but until the Revolution the forces which made for privilege and diversity were still too strong to be overcome. Nor do the *cahiers* of 1789 — the budgets of grievances which were laid

before the National Assembly — disclose any strong or general demand for unity of law; they were more concerned with particular local and personal grievances. It was the wonderful night of the 4th of August, 1789, when the privileged classes joined in making a holocaust of their privileges, when the different classes and peoples that made up France were fused into a single mass — it was this night that opened the doors for, and ushered in, the new legislation. A year afterwards, on the 16th of August, 1790, the National Assembly decreed that "the civil laws shall be revised and reformed by the Legislature, and there shall be a general code of laws, simple, clear, and appropriate to the constitution." And the constitution of September, 1791, repeated that "There shall be made a code of civil laws common to the whole kingdom."

But it was not enough to declare uniformity of law as a principle. There was a preliminary question, What law was to be adopted? How was the whole system based on privilege and inequality to be reconciled with the new principles of liberty and equality? When there was a conflict between the principles of two rival systems, such as the written law and the customary law, which was to prevail? Amendment had to precede codification.

The work of amendment was carried out by a series of revolutionary laws, and the double process, that of amending and that of codifying the rules of the civil law, occupied a period of some fifteen years. This period may be divided into two lesser periods, one from 1789 to 1794, the other from 1794 to 1804. The first was a period of progress, not always enlightened; the second was a period of reaction, not always obscurantist. During the first period the principles which prevailed were those of liberty and equality; during the second period they were order and authority.

During the first the influence of philosophers predominated, during the second the influence of lawyers.

Let me touch on the principal changes effected. Under the old régime the law of persons was based on privilege, inequality, disabilities. There were nobles, roturiers, and, in some places, serfs. The clergy had their immunities and their disabilities; the "religious" incurred civil death. The alien, the Protestant, and the Jew were subject to serious disabilities. A series of enactments swept away these differences and established broadly the principle of equality of civil rights. Marriage, under the old régime, belonged to the domain of the canon law, and was under the control of the clergy. The Revolution set up civil registers of births, marriages, and deaths, made marriages a civil contract, and recognised divorce. In family law it reduced the power of the father and raised the position of the wife. In the law of succession two rival principles were found in conflict with each other: the principle of individual liberty made for freedom of testation, the principle of equality made against it. The Roman law of the South favoured the former principle, the customs of the North the latter. Mirabeau, though a Southerner, in the great speech which was read to the National Assembly the day after his death, declared for the principle of equality, and it prevailed. The laws of nature were recognized by placing illegitimate children, for purposes of succession, on a footing almost equal to that of legitimate children. Succession in accordance with primogeniture, and entails, were abolished. The enjoyment of the land had been fettered by a multiplicity of burdensome dues, superiorities, and servitudes. The men of the 4th of August proclaimed in general terms the emancipation of the land, and left their successors to work out the problem. It

was worked out in very rough-and-ready fashion. At first an attempt was made to distinguish between feudal dues, which were to be abolished, and contractual dues, which were to be redeemed. But the distinction was found to be untenable, and eventually most superior rights were swept away without compensation. When the State had entered into the inheritance of the *émigré*, it endeavoured, for fiscal reasons, to restore some of these rights, but by this time the position of the occupier had become inexpugnable, and the attempt failed.

By all these radical changes the ground was effectively cleared for a code of uniform civil laws. It was the National Convention that first took practical steps for the preparation of such a code. In October, 1792, they appointed a Committee of legislation, consisting of forty-eight members, with Cambacérès as President. The Committee held evening sittings, which began at six or seven, and often lasted until eleven. They worked with enormous industry and with feverish rapidity, but their pace did not satisfy the Convention. On the 25th of June, 1793, a member of the Convention proposed and carried a resolution that the Committee of legislation should present a plan of a Civil Code within a month, and such a plan was actually expounded to the Convention by Cambacérès on the 9th of the following August. This, it will be remembered, was in the midst of the Terror. Cambacérès' Code followed the traditional plan of Justinian's *Institutes*, and was to be divided into four books, of which, however, the fourth, relating to procedure, was never drawn up. It consisted of 719 articles, and embodied, according to M. Viollet, the great historian of French law, a "clear methodical scheme." The Convention, in the midst of war, tumult, and proscription, peacefully discussed the laws of

succession, alluvion, and natural children, from the 22d of August to the 28th of October, but eventually laid aside the general scheme as too complex, though they passed parts of it into law. I take the subsequent stages from the valuable chapter which M. Viollet has contributed to the eighth volume of the *Cambridge Modern History*.

"On September 9, 1794 (23 Fructidor of the Year ii), the Committee presented a second scheme of 297 articles, a sort of summary, which only contained the principles involved and their immediate consequences. The Convention soon perceived that this was more the skeleton of a code than the Code itself. The discussion of it was suspended. A third scheme was presented, not to the Convention, but to the Council of Five Hundred, by the so-called Commission for the classification of laws (June 14, 1796 — 24 Prairial of the Year iv). This scheme, which according to Portalis was a masterpiece of method and exactness, was scarcely examined and remained almost entirely a dead letter. Jacqueminot presented a fourth scheme to the Legislative Commission of the Council of Five Hundred (30 Frimaire of the Year viii — December 21, 1799). This project was not discussed. Finally an order from the Consuls (24 Thermidor of the Year viii — August 12, 1800) commissioned Tronchet, Maleville, Bigot, Préameneu, and Portalis, to draw up a fresh project for a Code. This fifth scheme developed into the Civil Code; an imperfect piece of work it certainly was, but wise, well weighed, and saturated with traditional elements."

Napoleon, as is well known, felt a keen interest in the Civil Code. He presided over 35 out of the 87 sittings of the Council of State at which the draft Code was discussed. He took an active and effective share in the discussions of the draft, and, above all, supplied the driving force without which

it would probably not have become law. He is reported to have said at St. Helena that his glory did not consist in his having won forty battles, but in the Civil Code and in the deliberations of his Council of State. A brilliant description of the part which he played in the formation of the Code will be found in a chapter which Mr. Herbert Fisher has contributed to the eighth volume of the *Cambridge Modern History*. Napoleon's sympathies were, on the whole, and especially in the domain of family law, with the reaction which had set in since 1794 against the principles of 1789. He thought that the Revolution had unduly disturbed the foundations of family life. He held that the legislator, far from encouraging the indefinite subdivision of property, should aim at securing a nation of moderate fortunes. He was a keen advocate of the subjection of women. He thought that it was the function of law to chasten loose morals, to exhibit the solemnity and sanctity of marriage, to strengthen the authority of the father, and to maintain the cohesion of the family group. These views, which were shared by many others, find their reflection in the Code, which, on many points, partially retraces the steps that had been taken since 1789. Civil death was restored. A retrograde step was taken by basing the civil rights of aliens on the principle of reciprocity instead of on the principle of equality. The power of the father was restored, the civil status of women was depressed. The grounds of divorce were diminished in number, but divorce by mutual consent was, mainly through Napoleon's influence, allowed. Illegitimate children were less favourably treated. Testamentary powers were somewhat enlarged. The main lines of the revolutionary law of succession and of property had been too firmly established, and were too consonant with the wishes of the people at

large, to be set aside. But on many points the Code is a compromise, and not always a logical compromise. In the conflict between the written law of the South and the customary law of the North, the customary law, which had enjoyed the advantage of being expounded by Pothier, prevailed on the whole, but the Southern lawyers were propitiated by an express recognition of the *régime dotal* in marriage, as an alternative to the *régime communal*.

I have described at some length the origin and history of the French Civil Code, because, in discussing the aims, objects, and difficulties of codification, it is worth while to confirm and illustrate one's general statements by concrete examples, and no better example could be found than the most famous code of modern times.

Let me now say something, but more briefly, about the origin and history of the German Civil Code, the great Code which came into existence at the end of the last century as the French Code did at its beginning.

The tide of Napoleonic invasion brought the French Codes into the Rhenish provinces, where they obtained a permanent footing. Thibaut (1814) preached to Germans the duty of codifying their law on French lines, but Savigny, in his powerful counterblast, pointed out (and exaggerated) the imperfections of the French Codes, and told his countrymen bluntly that they had not yet acquired either the knowledge of legal principles, or the experience, or the terminology, requisite for successful codification. German codification slumbered until 1848, when it was awakened by the revival of the desire for national unity. A general law of bills of exchange (*Wechselordnung*) was discussed by representatives of all the German States, and promulgated as a law of the short-lived empire which followed the events of 1848. It

was either confirmed or introduced as a separate State law by most of the German States between 1848 and 1850. In a similar way, the German Commercial Code was passed as a State law by most of the individual States, including Austria, between 1862 and 1866. During the same period Saxony codified its own law. The events of 1866 and of 1870 gave a powerful impulse to German codification. In 1871, the Bills of Exchange Code and the Commercial Code were re-enacted as Imperial laws. A Criminal Code which in 1870 had been passed for the North German Confederation also became a law of the Empire. Codes of Civil and Criminal Procedure, a code organising the Courts throughout Germany on a uniform system, and establishing a Supreme Court of Appeal at Leipzig, and the Bankruptcy Code, came into force in 1879. Among the matters also dealt with by Imperial legislation were the laws relating to marriage and registration, to copyright, and to patents and trade marks. But as to matters not regulated by Imperial legislation, the local law was still applicable. "Speaking broadly," wrote Dr. Schuster in 1896, "it may be stated that out of a population of 42½ millions, 18 millions are governed by the Prussian Code, 14 millions by the German common law, which remains the modernised law of Justinian, 7½ millions by French law, 2½ millions by Saxon law, and half a million by Scandinavian law. There are, therefore, six general systems of law, but only two out of these, the system of the French and that of the Saxon Code, are exclusive systems; the other systems are broken into by laws and customs. . . . The result is that in every case which arises in Germany, the following questions must be asked: Is there any imperial statute? Is there any local modern statute? Is the subject affected by older legislation? What local law governs it?"

It was the confusion and the practical difficulties arising from this multiplicity and diversity of laws that gave force to the demand for the general Civil Code, which has formed the coping-stone of German Codification. The first Commission for preparing a draft Civil Code for the German Empire was appointed on July 2, 1874, and submitted its draft to the Imperial Chancellor towards the end of 1887. A second Commission was appointed in April, 1891, and completed its work in June, 1895. On the basis of this second draft, a third draft was prepared by the Federal Council and submitted to the Reichstag at the beginning of 1896, and after being discussed and amended was passed into law on August 18, 1896. The Code came into operation on January 1, 1900.

It will have been seen that the impulses to codification in Germany were substantially the same as in France, but that, owing to a variety of causes, those impulses produced their effects at a later date.

It was the pressure of practical needs that gave the impulse to codification both in France and in Germany. And it was practical needs that gave the impulse to codification in British India. Of the circumstances which gave rise to the Indian Codes, of their origin, history, and nature, I have treated at large elsewhere.[1] The most serious of the practical difficulties which the earlier Indian Codes were intended to meet were the impossibility for Englishmen to administer the Mohammedan criminal law, and the need of authoritative manuals for the use of embarrassed judges and magistrates. Among the Anglo-Indian codes Macaulay's Penal Code stands first, first in point of time and first in point of merit. The brief preamble recites that it is expedient to

[1] *Government of India*, Ch. IV.

provide a general penal code for British India. And the expediency of providing such a code is apparent if you bear in mind the state of things which it was intended to meet. When the Code came into force, the condition of the criminal law in British India was this: In the three Presidency towns,—Calcutta, Madras, and Bombay,—the criminal law in force was the criminal law of England, unreformed for Indian purposes except by three or four scattered enactments. Outside the three Presidency towns the criminal law was partly the law introduced by the Mohammedan conquerors of India, and partly the law established by certain Anglo-Indian regulations. The English criminal law was a formless, artificial, and complicated system, framed without reference to Indian circumstances, and even in England considered to require extensive reform. The Mohammedan criminal law was unsuitable to a civilised country. The Anglo-Indian Regulations were made by three different legislatures — those of the three old Presidencies — and contained widely different provisions, and many of those provisions, according to a distinguished predecessor of mine in India, were amazingly unwise. It was to meet these circumstances that Macaulay drew up his famous Penal Code. His code is methodically arranged, is expressed in clear and simple language, is framed in accordance with the general principles of English criminal law, but in some respects modifies the application of those principles so as to adapt them to special Indian conditions. Macaulay's Penal Code is a work of genius, but it slumbered in the Indian archives for nearly a quarter of a century before it found its place in the Indian statute book. This Penal Code was supplemented by Codes of Civil and Criminal Procedure, which have been revised and recast from

time to time, and these three codes met the most pressing needs of the Indian case. Then came a number of codifying Acts or codes, the object of each of which was to supply, for the guidance of untrained judges and magistrates, a set of rules based on English law, but expressed in a form which those who had to administer them could easily understand, and adapted by modifications to the circumstances of the country. This is the class of Acts to which belong the Evidence Act, the Contract Act, the Succession Act, the Specific Relief Act, the Negotiable Instruments Act, the Trusts Act, the Transfer of Property Act, and the Easements Act.

It was my duty, during one period of my official life, to pay a good deal of attention to these Indian Codes, and they have been the subject of much discussion and criticism. They have, in my opinion, been overpraised and overblamed. There has been a tendency, on the one hand, to overpraise their formal merits, and, on the other hand, to underrate their practical utility as instruments of government. Their workmanship, judged by European standards, is often rough, but they are on the whole well adapted to the conditions which they were intended to meet. High Court judges and the advocates who practised before them were, in my time, accustomed to speak in depreciatory terms about these codes, but I think it probable that these critics ignored or overlooked the extent to which the Codes have been found useful by up-country judges and magistrates who have to administer justice, as best they can, at a distance from law libraries and without the help of a trained bar. One of the criticisms which I used to hear most frequently was that some of the Codes were framed too much with reference to theoretical considerations and not enough with reference to practical needs, and I am inclined to think that there was

some foundation for this criticism. My immediate predecessor in India, the late Mr. Whitley Stokes, an eminent man, who was not only a learned lawyer and skilful draftsman, but, incidentally, a first-rate Celtic scholar, was the draftsman of some of these codes, and brought out a useful edition of them. He was fond of referring in his comments to the absence or paucity of judicial decisions on a particular Act as evidence that it was working well or smoothly, by which he meant that it had not been vilified or nullified by the judges. But I sometimes wondered whether the inference to be drawn in some cases was not rather that the Act had been working 'in vacuo,' without much practical operation. It is comparatively easy to pass laws in India; the difficulty is in making them work. They are apt to remain for an indefinite time "in the air," and when they touch earth they sometimes operate in unexpected fashion.

I can give you a very curious illustration of this statement. One of the codifying Acts — the Indian Succession Act — embodies substantially the rules of English law as to succession to personal property. It was framed for Indian use by a learned body of Law Commissioners sitting in England, and was carried through the Governor-general's Legislative Council in India by Sir Henry Maine, when he was Law Member of that Council. But Sir Henry Maine found that the provisions of this Act would not suit the circumstances or requirements of the most numerous and important classes in India, and was therefore compelled to make important exceptions from its application. The rules of English law as to succession to property would not suit Hindus, or Mohammedans, or Buddhists, or Sikhs, or Jains. All these classes had quite different rules of inheritance of their own, which they wished to keep, and so they had to be exempted.

Nor was the law required for succession to the movable property of persons domiciled in England or elsewhere out of India. That succession was to continue to be governed by the law of the deceased persons' domicile. The result was that the exceptions which had to be made from the application of the law covered almost all the propertied classes in India. These large exemptions may account for the fact that the law worked smoothly, to use Mr. Whitley Stokes' phrase, and did not give much occupation to the courts.

There was, however, one class, an important, but in India not a very numerous, class, whom Sir Henry Maine persuaded to accept his Act. These were the Jews, who are always willing to accommodate themselves to the civil law of the country in which they settle, whilst remaining faithful to their own religious usages. So the Indian Succession Act of 1865 was made applicable to the Jews of British India, who are, as I have said, a comparatively small class of persons. All went well for about twenty years. The Act worked smoothly. But in or about the year 1886, when I was law member of the Governor-general's Council in India, an unexpected difficulty arose. Aden, the Port of Aden, though geographically situated in Arabia, is, technically, part of British India. Therefore an Act applying to the Jews of British India applies to the Jews of Aden. For some twenty years the Jews of Aden seem to have gone on in blissful ignorance of the law which had been passed for them by the government of India in 1865. At last a case raising a question of succession among Aden Jews found its way into the Civil Court at Aden. The judge looked up his law, found that the Indian Succession Act applied, and decided accordingly. His decision very much fluttered and perturbed the Jews of Aden, because it was quite at variance

with their ancient customs. So the Jews of Aden sent a deputation to the government of India representing their grievance, and the deputation was received by me on behalf of the government. They explained their grievance, which was that this new-fangled Act, of the existence of which they had suddenly become aware, was quite inconsistent with their old law; that the Jews of Yemen, the part of Arabia in which Aden is situated, had been under this old law for some thousands of years, that it gave them what they wanted, and that they would like to remain under it. I asked them what their old law was, and they referred me to a passage in the Pentateuch, in the book of Numbers. Fortunately I had a copy of the Old Testament in my bookcase, close at hand, so I looked up the passage to which I was referred. It contains what I am tempted to call, if I may do so without profanity, the ruling in Zelophehad's case.[1] Zelophehad, you may remember, was a man of the tribe of Manasseh, who died leaving no son but five daughters, and these daughters came to Moses, and claimed a share in their father's inheritance. Thereupon it was declared, on the highest authority, through Moses, that if a man died leaving daughters but no son, his inheritance should pass to his daughters. That declaration was modified by a subsequent provision,[2] that if a daughter married out of her tribe, she should forfeit her share. Let me remark, parenthetically, that this rule, and especially the exception about daughters marrying out of the tribe, represents a custom or customary law with which I was not unfamiliar. The Mohammedan law of inheritance divides the property of a deceased person among persons called "sharers," who include widows and daughters. There are a great many Mohammedans in the

[1] Numbers xxvii. 1–11. [2] Numbers xxxvi.

Punjab, who are supposed to be bound by the law, the divine law, of the Koran, but the application of this law is much modified by local and tribal customs. They have a general feeling that the law of the Koran is very suitable to movable property, such as a flock of camels, but is inconvenient when applied to land. They sometimes cut down the widow's right to a share of the land to a right of maintenance, and nothing would induce them to allow a female sharer to carry by marriage any portion of the village or tribal land to a person who is a stranger to the village or tribe.

But to return to my visitors from Aden. What struck them as novel and monstrous was that the new law which had come upon them by surprise recognised a right in the inheritance on the part, not only of the children, but of the widow, for whom no provision was made by the Mosaic law. They asked that they might be allowed to return to their old law, and they referred me to a section of the Indian Succession Act (s. 332) which enables the government of India by executive order to exempt from all or any of the provisions of the Act the members of any race, sect, or tribe in British India or any part of such race, sect, or tribe, to whom it may be considered impossible or inexpedient to apply such provisions.

The request struck me as being not unreasonable. But before disposing of it, I made two stipulations. The first was that whatever might be done for the Jews of Aden should not be construed as a precedent for exempting the Jews of British India proper, who had accepted the Act and did not complain of its operation. The second was that I should be supplied with an authoritative statement of the laws and customs observed by the Jews of Yemen; that is to say, of that part of Arabia in which Aden lies. Both these stipula-

tions were complied with. I received from the leading Jews of British India proper an assurance that they would not ask for any exemption for themselves. And I was supplied with an extremely interesting statement of the laws and customs of the Jews of Yemen, showing that for generations, in fact, during an indefinitely long period, they had never formed part of any civilised or settled State, and therefore had preserved their ancient laws and customs in an exceptionally uncontaminated form. The evidence satisfied me, and so, at my instance, the government of India made an order exempting the Jews of Aden from the operation of the Indian Succession Act, and remitting them to the Mosaic code.

I have travelled a long way from the French and German Codes, from the West to the East, from Napoleon to Moses.

Now let me come back to the thesis which I was trying to enforce and illustrate, which was this — that the great European codes represent the fruits of the work of many generations, that the difficulties in the way of forming a good code, especially if it is on an extensive scale, are very serious, that they are only surmounted by the pressure of practical needs, and that in France and Germany, which I took as leading examples, the need which mainly supplied the pressure was the need for unification of a country's laws.

If this thesis can be maintained, does it not go a long way to explain the apathy and indifference with which projects of codification are generally regarded in England?

Our great Plantagenet kings, and their strong central courts, gave England many centuries ago that one body of general law for which France had to wait until the beginning of the nineteenth century, and Germany until its end.

The traditional opinion of English judges and lawyers has, as you know, always been unfavourable to codification.

They believe that codes tend to cramp and impede the free and natural growth of law. How far that belief is well founded is a question which I will not argue here. The discussion of it would lead me into wide and troubled waters, and would at any rate carry me far beyond my proper limits. I will content myself with making one remark of general application, and then considering, very briefly, how far the forebodings of those who are opposed to codification on principle have been justified by the experience gained from the actual working of the French Codes, after they have been in operation for more than a century.

The general remark is this: —

As long as a nation continues to live and grow, nothing can stop the growth of its law. The rules of law are simply those rules of conduct which are enforced by the State, and they have to be applied with reference to the political, social, and economic conditions of the time. Absence of power to legislate, or failure to exercise it, may impede, cramp, or distort the growth, but cannot destroy it. The stream will either burst through, or, more often, find its way by tortuous and unexpected channels. The human mind displays marvellous ingenuity in adapting old forms to new conditions, whether those forms are embodied in codes or in creeds. The principle of development has been applied, not only to theological formularies, but to documents like the Constitution of the United States, and, under the pressure of inexorable necessity, is somehow applied in apparent defiance of the rules of logic and of language.

Moreover, are not people apt, in England, and possibly in the United States also, to exaggerate both the flexibility of the common law and the rigidity of codes? Are we not all familiar with cases in which the highest courts, bound as

they are by precedents, have reflected the views rather of a past generation than of the present, and found themselves unable to assert for themselves or to recognise in others those principles of liberty and development which are essential to organic life and growth?

Next let me ask this question: —

What has been the verdict of history on the Civil Code? Perhaps our opinion will not differ much from Mr. Fisher's summary in the chapter which he contributed to the *Cambridge Modern History*: —

"The Civil Code was a hasty piece of work; and the First Consul imported a strong gust of passion and politics into the laboratory of legal science. Civil death — a superannuated, unjust, and immoral fiction — confiscation, and the position of women, are bad blots upon the page. . . . There is also much disproportion and omission. There are instances of a subject being discussed in the Council, then forgotten and allowed to lapse. The law of contract is lifted almost bodily from Domat and Pothier. But, when all deductions have been made for haste, negligence, and political perversion, it remains a great achievement. It was a single code for the whole of France, substantially based upon the broad historic instincts of the race, while preserving the most valuable social conquests of the Revolution."

Two things, at any rate, the Code has done. It has familiarised all Frenchmen with the principles of the law which they have to observe. It has supplied a model which other nations have eagerly and extensively copied.

In England the law is ordinarily regarded as something technical, mysterious, not to be understood by the lay folk. In France the leading provisions of the Codes have become household words. They form the topic of village conversa-

tions. Familiarity with them is presupposed in popular literature and on the stage. Balzac, the great novelist, though a legitimist, was saturated with the Codes. There are few better commentaries on the French marriage law than his *Contrat de Mariage*, on the French bankruptcy law than his *César Birotteau*. You may hear an article of the French Penal Code referred to by its number on the stage, and the reference at once caught up by the audience. A stage reference to 24 and 25 Vict. c. 96, s. 75, would not meet with much response from an English gallery.[1]

As to the contagious effect of the French Codes on neighbouring countries, a whole series of studies has been devoted to the subject in the Centenary volumes to which I have referred, and I will not elaborate the topic here.

Then, in what sense and to what extent, have the French Codes arrested the development of French law? I think that they have to some extent, but more in the domain of procedure than of substantive law, more in the sphere of commercial law, where the Code de Commerce followed too closely antiquated models, than in the sphere of general civil law, and, in the whole field of law, to a much less extent than is generally supposed in this country. French lawyers recognise three modes by which law is developed: legislation, *jurisprudence*, or case law, and *doctrine*, that is to say, the teachings and writings of learned lawyers. I doubt whether we have realised — certainly I myself had not realised until

[1] Provisions of English law have sometimes been utilised by English novelists. For instance, the plot of George Eliot's *Felix Holt*, which is said to have been suggested to her by Mr. Frederic Harrison, is based on the rules of English real property law with respect to the succession to what conveyancers call a 'base fee.' But, as a general rule, the notions of English novelists about English law strike a professional lawyer as eccentric and surprising, and do not indicate much familiarity with the principles of the law which the authors are supposed to understand or observe.

recently — the extent to which the Civil Code has been altered by legislation, especially within the last twenty or thirty years. I took up recently a little pocket edition of the Civil Code, showing in a convenient form the existing text of the law and the original articles of the Code. The existing text is printed in ordinary type; the original articles are in italics. Let me take the first chapter of the first title of the first book. It relates to the enjoyment of civil rights, and consists of ten articles. Of these only three remain; the other seven have been repealed and replaced by others. Of the original seventeen articles in the second chapter not one remains; all have gone, including the articles which recognise civil death. The provisions relating to registration of births, marriages, and deaths have been materially amended. Many of the obnoxious articles relating to the position of women still remain, and their survival explains the hostile demonstrations against the Civil Code which, at the time of the celebration of its centenary, were made at the Sorbonne and in the Rue de Rivoli. But wives and husbands have been put on a footing of equality as regards divorce for adultery, and the whole law of divorce has been completely recast by the laws of 1884 and 1886. It may be remembered that divorce was recognised in 1804, abolished in 1816, and restored in 1884, but under different conditions. The power of the father over neglected or ill-used children has been restricted by, and may be taken away under, a law of 1889, which enables the State to intervene in the case of such children.

The law of succession has also been materially altered. The disabilities of aliens in the matter of succession were removed as long ago as 1819. By a law of 1891 the surviving husband or wife was given a share or interest in the inheri-

tance, notwithstanding the existence of children. The rules as to the succession rights of illegitimate children were completely remodelled in 1896. The technical rules which require children claiming a share of the inheritance to account for advances made by the parent during his lifetime were amended in 1898. Succession duties on inheritance are now regulated by the fiscal laws of 1901, 1902, and 1903. The law as to wills made by soldiers and on board ship was amended in 1893 and 1900. In the chapters relating to property law the rules with respect to party walls, boundary fences, and ways of necessity were altered in 1881, and those as to alluvion and water rights in 1898.

The important chapters of the Code which relate to delicts and quasi-delicts have been supplemented and materially altered by the laws of 1898, 1899, and 1902 for regulating the responsibility of employers in the case of accidents to their workmen. The rules as to the contract of service in the case of domestic servants and workmen had been previously expanded and made more precise by a law of 1890.

The famous association law of 1901, with its supplementary decrees, though best known in its bearing on religious congregations, is of much wider application, and in the latest editions of the Civil Code finds its place as part of, or a supplement to, the title relating to the *contrat de société*. The law as to aleatory contracts was supplemented by a law of 1900 as to gambling on the Stock Exchange. And, finally, I may note that imprisonment for debt was abolished in 1867.

I have not, of course, attempted an exhaustive statement of the changes made in the Civil Code since the date of its enactment, but I am sure that I have said enough to show that it has never been treated by the French legislature as a sacrosanct or verbally inspired document.

Bentham looked forward to a time when case law, or, as he preferred to call it, judge-made law, would be superseded by codes, and when commentaries would be consigned to the lumber room. If his views could be accepted, the French Civil Code must be pronounced to be a failure. It has not, fortunately for us, stopped or made unnecessary historical inquiries into French law as it stood before 1804. It has not checked the production, or prevented the citation, of commentaries. That it has not arrested the development of *jurisprudence*, the numerous and portly volumes of Dalloz can testify. Expressions not unlike those of Bentham may be found in the reports presented by Cambacérès on his earliest projects of codification. But these were the views, or at least the expressions, of the Cambacérès of the Convention, not of Cambacérès the Consul, and there is no reason to suppose that the framers of the Code of 1804 shared the illusions of 1793. On the contrary, it would be easy to quote from the preliminary report of the Commission of the Year viii passages which lay stress on the inevitable imperfections of a code, and recognise fully the necessity for the completing and supplementary action of judges.

What the Code has really done for French *jurisprudence* has been to simplify and facilitate the work of the judges by substituting for numerous and conflicting laws and usages a harmonious, orderly, and authoritative set of leading rules. Nor is there any solid ground for believing that the codification of French law has been detrimental in France to legal literature or *doctrine*. We are indeed told by some French writers of authority that there was a time when the teaching in the French law schools, and the legal literature which arose out of and gathered round these schools, threatened to degenerate into arid and barren commentaries on

the text of the Civil Code, unilluminated by any intelligent study of legal history or by a scientific appreciation of legal principles, and when a gradually widening breach arose between the law as taught in the schools and the law as developed in actual practice by judicial decisions. Had these tendencies continued, they would have supplied the ground for a formidable indictment against codification. But if the same authorities are to be trusted, these tendencies have not continued. I am not in a position to speak from personal knowledge of the character of the teaching now given in French schools of law. It may be that a good deal of it, as of the teaching in other schools, is lifeless and mechanical. But there seems strong evidence to show that during recent years much has been done in the French Universities to improve the teaching and study of law, and that the tendency during the last quarter of a century has been to stop the threatened divorce between theory and practice, by insisting on study of the texts being accompanied, illustrated, and vitalised by study of judicial decisions, and at the same time to widen and deepen the theoretical study of law by dwelling on its historical and comparative aspects. The influence of the late M. Esmein, to mention only one well-known name, has been exercised strongly in this direction. Certainly the legal literature of France has no reason to fear comparison with the legal literature of countries which are blessed, or otherwise, with immunity from codes. Take, for instance, the department of legal history. We are indebted to Sir Frederick Pollock and the late Professor Maitland for a fragment — a most brilliant fragment, it is true, but merely a fragment — of the history of English law. But we have not as yet any comprehensive history of English law as a whole; we have nothing that could be compared

with the works of M. Viollet and M. Esmein on the history of French law. The French Society of Comparative Legislation, which was founded in 1869, and which was largely responsible for the celebration of the centenary of the *Code Civil*, has done and is doing excellent work in familiarising French lawyers with the legislation of other countries. And the historical and scientific study of law is by no means confined to Paris.

To the advanced and scientific student of law the *Code Civil* has supplied a framework to be filled in, supplemented, and illustrated. And to the ordinary student of law it is an inestimable boon that he should be able to find, within reasonable compass, an orderly and authoritative statement of the leading rules of his craft. A few years ago a young French lawyer wrote to me from a French provincial town, applying to me as a brother member of the *Société de Législation Comparative*, for information about a point of English legal procedure, and he wound up by asking me, with much simplicity, whether I could refer him to any concise and complete work on English civil law. I was unable to comply with this request, and was obliged to say that there was nothing in England that corresponded to the French *Code Civil*. Was this answer quite satisfactory? But could any more satisfactory answer have been given?

IX

SOME CHARACTERISTICS OF MODERN LEGISLATION

If I were dealing with my subject professorially, I might ask you to consider it, on a far more extensive scale than I have attempted, from a comparative point of view, to consider how enacted laws are in fact made in the different civilised countries of the modern world, what different methods of making them are adopted, what advantages may be claimed for the several methods, what are their defects. This would be a very large subject; and it is one which, so far as I know, has never been adequately dealt with, though some useful works have been written about certain parts or aspects of it. I would mention in particular the book of your eminent countryman, President Lawrence Lowell, on *Government and Parties in Continental Europe*. But in this region of study a large field still remains untilled, and deserves the application of labour which would be fruitful and valuable. Any one who would undertake the task of survey and comparison which I have indicated would find his toil materially facilitated by two things: —

The first is, that there is an agreement among all civilised nations as to the general principles on which legislative procedure should be founded. A modern law is not brought down from Sinai, or imposed by the will of an irresponsible despot. Every important law must, before it takes its final shape, be submitted to the scrutiny and criticism of a popular assembly created for that purpose, and be liable to amend-

ment and rejection by that assembly. The extent to which this process of scrutiny, criticism, and amendment is applied, and the methods by which it is applied, differ according to the nature of the subject-matter, and the procedure, habits, and idiosyncrasies of the legislature. The subject of a law may be so technical, and popular confidence in the skill, care, and ability of those who prepared it may be so great, that it passes through the legislature practically without criticism or alteration. Some of the great codifying measures of recent times have had this good fortune, though it must be remembered that the German Civil Code, perhaps the greatest, and certainly one of the most carefully prepared, of all these measures, underwent not only effective criticism, but substantial alteration, in its passage through the German Reichstag. On the other hand, any measure proposing important administrative or fiscal changes, restricting or regulating the freedom of action of any class of the community, or materially affecting their economic condition, ought to undergo, and is pretty certain to undergo, severe scrutiny by the representatives of the people. But liability to this scrutiny exists in all cases, and one of the most difficult of the problems of modern legislation is how to reconcile the right of criticism and amendment which is properly claimed by a popular legislative assembly with the precision of language, the elegance and symmetry of form, which are the characteristics of a good law.

General agreement as to the broad principles by which legislative procedure should be guided is, then, one of the things which facilitate comparison. Another is that both the constitution and the procedure of all modern legislatures, with a very few exceptions, may be traced back to a single prototype, the Parliament which sits at Westminster.

Upon the relations of affiliation borne to the constitution of the British Parliament by the constitution of the American Congress and by the constitutions of the legislatures in the British dominions it is unnecessary to dwell. And it is a commonplace of history that when the constitutions of European countries were being refashioned after the subsidence of the Napoleonic deluge in 1815 the British Parliament, with its two Houses, was generally adopted as a pattern.

As regards legislative procedure I may remind you that in every self-governing dominion of the British empire the instrument of constitution always contains a provision that the procedure of the legislature is, in the absence of specific direction, to be in accordance with parliamentary procedure in England, and that the standing orders of those legislatures are based on those in force at Westminster and on the procedure described in Erskine May's great treatise. But about the relation between parliamentary procedure in England and parliamentary procedure in foreign countries, it may be worth while to say a little more.

Among foreign countries it would be technically right to class the United States, but it seems unnatural so to class, and it is always repugnant to me so to class, a great country the spirit of whose institutions is so essentially British. All that I need do here is to remind you how Thomas Jefferson, before he became President of the United States, but when he was Vice-president and therefore President of the Senate, compiled for the use of the Senate a manual of procedure based on the practice of the British Parliament. Since then the procedure of both branches of Congress has been largely modified by subsequent orders, rulings, and precedents, but Jefferson's manual is still embedded as a kernel in the stout volume which answers more or less to the English

May. Any one who is familiar with parliamentary procedure at Westminster and visits Washington cannot fail to be struck with the curious traces of English eighteenth century procedure which still survive there.

About the way in which English parliamentary procedure found its way into France, and how, through France, its influence permeated other parts of Europe, less is generally known, and on the first of these two points, the introduction of English parliamentary procedure into France, I am tempted to quote the accounts given by two men, each of whom was entitled to speak with high authority, and I am the more inclined to do so, because for one of these accounts you would have to search the recesses of an English blue book.

You are probably familiar with the name of Étienne Dumont, the citizen of Geneva who was the friend of Romilly and the interpreter of Bentham. At the outbreak of the French Revolution in 1789, Dumont was in Paris, and was in close and intimate relations with Mirabeau. No one was a greater adept at picking other men's brains than that unprincipled genius, and Dumont was largely employed by him in writing his speeches, and composing the literature which he scattered broadcast, and generally in helping him in his work with the National Assembly. In fact, he devilled for Mirabeau on an extensive scale. One of the first things required was to devise some kind of procedure for that newborn and unorganised body, the National Assembly, and this is what Dumont, in his *Souvenirs sur Mirabeau*, tells us about the proposals on the subject. He writes: —

"Romilly had done a very interesting piece of work on the rules observed by the House of Commons in England. These rules are the fruit of reasoned experience, and the more they

are examined, the more they are admired. They are customs carefully preserved in a body very averse to innovations. They are not reduced to writing; to state them requires great care and great trouble. Romilly's little Code indicated the best way of putting questions, of preparing motions, of debating them, of taking votes, of appointing committees, of passing business through its various stages; in a word, all the tactics of a political assembly. I had translated this treatise at the beginning of the States General. Mirabeau presented it to the House and laid it on the table when there was a proposal to draw up rules of procedure for the National Assembly. 'We are not English, and we don't want anything English.' This was the reply made to him."

So far Dumont. Now let us hear what was said about the same subject many years afterwards by a great French statesman. In the summer of 1848 Guizot was in England, having been driven from France by the Revolution of February. In that summer a select committee of the House of Commons was sitting to consider the public business of the House, and on the 31st of July Guizot was called to give evidence before it. Evelyn Denison, afterwards Speaker, was in the chair, and the first question — a very leading question — which he put to Guizot, was this: "Were the rules and orders of the French Chamber originally very nearly the same as those of the House of Commons?"

Guizot's answer was: "Yes. In the beginning of our constituent assembly at the Revolution, Mirabeau asked Étienne Dumont to give him a sketch of the proceedings of the English House of Commons, and Étienne Dumont gave to Mirabeau such a sketch, which is printed in a work called *The Tactics of Political Assemblies*, and the sketch of Étienne Dumont became the model of the first rules of our National

Assembly. So that in the beginning of our Revolution the proceedings of your House of Commons became the source of ours. In 1814, when the charter was granted by the King [Louis XVIII] the same rules were adopted, with some changes."

You will see that the two accounts do not quite tally. Dumont's requires some supplementing; Guizot's a little correction. What really happened seems to have been this. The treatise prepared by Romilly, and translated by Dumont, was published as a pamphlet, and was subsequently absorbed into and incorporated in a larger work which was inspired by Bentham, and based upon his notes, but was written by Dumont, and given by him to the world in 1815 under the title of *La tactique des assemblées législatives*. This work, of which a second edition appeared in 1822, exercised a very great influence on statesmen and on political writers and thinkers, not only in France, but in other parts of Europe, and much use was made of the information and suggestions which it contained in framing the rules of procedure for the European legislatures which came into existence in the first half of the last century. It is to be found in its English form, under the title of an *Essay on Political Tactics*, in the second volume of Bentham's collected works.

This has been, perhaps, too long a digression from my main theme. Let me return to what I said a short time ago about the difficulty of reconciling the demand for accuracy, precision, and consistency in the language of laws with their liability to alteration in the course of their passage through a popularly elected legislative assembly. The difficulty is serious; the problem has never been solved, perhaps does not admit of being completely solved. And I often think that some of the criticisms passed on the form of our statute

law, especially those which animadvert upon desultory and fragmentary legislation, indicate an imperfect appreciation of the difficulties with which modern legislators have to contend, and a misconception of the task which popular legislatures have to perform.

What is that task? If I had to describe what it is not, I could hardly do better than quote some remarks attributed to the great Napoleon. I have been unable to trace the authority for attributing to him the precise words used, but they undoubtedly express his real opinion. "No one," Napoleon is reported to have said, "can have greater respect for the independence of the legislative power than I; but legislation does not mean finance, criticism of the administration, or ninety-nine out of the hundred things with which in England the Parliament occupies itself. The legislature should *legislate*, *i.e.* construct grand laws on scientific principles of jurisprudence, but it must respect the independence of the executive as it desires its own independence to be respected. It must not criticise the government, and as its legislative labours are essentially of a scientific character, there can be no reason why its debates should be reported."

Now that is not our conception, nor is it your conception, of the functions of a legislature. Neither in your country nor in ours does the legislature find itself called upon to construct grand laws on scientific principles of jurisprudence. If it were called upon to do so, it would act wisely were it to follow the example set at the end of the last century by the German legislature, hand over the task of preparing and settling such laws to a body of skilled persons, reserve to itself full powers of criticising or rejecting their work, but not attempt to perform itself work for which it is not fitted, and which it was never expected or intended to perform.

I will go further, and say that modern legislatures do not concern themselves much or often with amending the general rules or principles of what may be called private law, as distinguished from public or administrative law. That is certainly true in the case of the Parliament at Westminster, and it is probably true of the legislatures in your country also. Not that our Parliament has ever hesitated to intervene in the domain of private law, or allowed its right and power to do so to be questioned. When the development of common law rules has failed to keep pace with changes in social or economic conditions, when a too servile adherence to precedents has forced these rules into a wrong groove, our legislature has never shrunk from stepping in and bringing the rules into conformity with the national will and national requirements. But such interventions have been comparatively rare. And when they take place, the tendency of Parliament has always been to leave such matters very much in the hands of professional lawyers. What I have said does not apply to criminal law. Nor does it apply to the exceptional cases where the operation of a rule of civil law is of great and general public interest, as in the case of the law of marriage and divorce, or of the rules which regulate the position of trade unions or of the liability of employers for injuries to their workmen. But as a rule the Parliament at Westminster does not take much interest in what I have ventured to call "lawyers' law." And the same thing appears to be true of Continental legislatures. For instance, the French legislature has, as I have pointed out, frequently amended the provisions of the French Civil Code. But I learn from one of the essays in the centenary volumes on the *Code Civil* to which I have previously referred, that these amendments have rarely evoked much interest outside

the legal profession or been the subject of much discussion within the legislature.

What then *is* the ordinary task of a modern popular legislature? It is, I submit, to remove discontent and to avert revolution, by making laws which adapt the political, administrative, and economic arrangements of the country to the requirements of the times. Its success in so doing is the test by which it should be tried.

When the authors of books on jurisprudence write about law, when professional lawyers talk about law, the kind of law about which they are usually thinking is that which is to be found in Justinian's *Institutes*, or in the Napoleonic Codes, or in the new Civil Code of the German Empire, that is to say, the legal rules which relate to contracts and torts, to property, to family relations, to succession and inheritance, or else the law of crimes as it is to be found in a Penal Code. They would include also the law of procedure or "adjective law," to use a Benthamic term, in accordance with which these substantive rules of law are administered by the courts. These branches of law make up what I call "lawyers' law." Now, as I have already pointed out, no legislature in the world has asserted more continuously, more trenchantly, or more effectively, its supremacy over every branch of the law than the British Parliament. It has indirectly altered the common law rules of contract, of tort, of property, of marriage, of inheritance. It has recast the law of crimes and criminal procedure, not artistically or completely — indeed, very much the reverse — but sufficiently to give effect in substance to almost all the reforms which Bentham was advocating a century ago. It has remodelled the constitution as well as the procedure of the courts. It has never hesitated to do these things. But at the same time it has

never considered the doing of them to be its main function. The bulk of its members are not really interested in technical questions of law, and would always prefer to let the lawyers develop their rules and procedure in their own way. The substantial business of Parliament as a legislature is to keep the machinery of the State in working order. And the laws which are required for this purpose belong to the domain, not of private or of criminal law, but of what is called on the Continent administrative law. If you were to take up a file of our public bills for a session, or an annual volume of our public general statutes, you would find that it confirms this statement. There is usually a sprinkling of measures or proposed measures which, to use the language of legal journals, "are of special interest to the legal profession," but the proportion which these bear to the whole mass of Acts and bills is extremely small. The bulk of the statute book of each year usually consists of administrative regulations, relating to matters which lie outside the ordinary reading and practice of the barrister. This has probably always been a characteristic of English legislation, but it has been so in a marked degree during the period which has elapsed since the Reform Act of 1832.

The world in which we live is constantly and rapidly moving and changing. It is moving and changing under the operation of physical forces such as petrol and electricity, and, still more, of the gigantic force of accumulated and concentrated wealth. And, not only in the old European world, but, as your Ambassador to England pointed out in the extremely interesting address which he delivered in London last Independence Day, in your own world also, it is moving in the direction of conferring greater powers, and imposing greater responsibilities, on the executive

government. I do not discuss the question whether, and how far, this tendency is wise or salutary. I only bid you remark that it exists. And so long as these movements and changes take place, so long as this tendency exists, there will be a demand, and an insistent and imperative demand, for fresh legislation. It will often, it will inevitably, be met by protests against overlegislation. These protests are often justified. Much modern legislation is crude, hasty, unwise. Much of it proceeds from an imperfect conception of what is needed and what is practicable. But protests of this kind too often come from those who are fortunate enough, if fortunate is the right word, to find the world as it is all that it should be in so far as they themselves are concerned, and therefore desire no change for themselves, and do not realise the need of change for others. There are such people, who can honestly and sincerely say, "Rest and be thankful." But unless I am much mistaken, "Rest and be thankful" is not the normal attitude of mind of the American citizen, of the electors who constitute the driving force of American legislatures. They recognise the changes which are taking place in the world. They rejoice in them. They like to know and feel that the world is moving on, and that they are helping to move it. And their representatives are hard-headed, practical business men like themselves. They are not, for the most part, scientific lawyers, and they care little — far too little — about the form of their proposals, provided they get substantially what they want. To tell such men that they must be content with laws and institutions that satisfied their ancestors is like telling a manufacturer that he must be content with machinery which ought to have been scrapped long ago. It may be that they are in too great a hurry to scrap. But scrap

they must, unless they are content to fall behind the times.

Now legislation conducted with such objects, under such conditions, and by such persons, must necessarily be open to the charge of being desultory and fragmentary. Fragmentary, because, if you wish to add to your house or to repair it, you do not, as a rule, pull it down and build it afresh. No more would you if you discovered a defect in one of your laws, proceed, as a rule, by way of repeal and re-enactment. You would probably try to pass an amending Act. Moreover, legislation of the kind required in modern States often is, and often ought to be, tentative and experimental. You try your experiment on a modest or limited scale at first, and extend it afterwards if it proves successful. Or you introduce a new scheme, knowing that you cannot tell exactly how it will work, or what are its defects, until it has been brought into operation. If it fails to work satisfactorily, you can and do amend it. Thus it comes to pass that the great majority of modern statutes are amending or extending Acts. And these may be piled upon one another until they become a huge amorphous mass.

We must deal with things as they are, remember that we are not in a republic of Plato, but in the republic of the United States, and consider what practical methods can be applied for diminishing the imperfections, the necessary imperfections, of modern statute law.

Two of these methods I have already indicated. You can and should do what is possible to improve the form of your bills by training up schools of draftsmen, and by availing yourselves of expert assistance in the preparation of your laws. You can, and you should, keep a watchful eye on the

condition of your statute books, and, by applying steadily the processes of revision and consolidation, make their contents more intelligible to those who have to use them and to be bound by their provisions.

What can be done by improving the methods of procedure for the discussion, amendment, and revision of legislative proposals after they have been introduced into the legislature? That is a question which is always being asked at Westminster and to which no satisfactory answer has yet been found. The problem of modern legislatures is to reconcile the demand for full and free discussion with the need of getting business through. If infinite time were at the disposal of the legislature, the problem might be solved — in the course of infinite time. But legislative time is limited, legislative business is heavy and tends to increase, and in England the longest session — and our recent sessions have been oppressively long — does not nearly suffice for disposing of the business set down for consideration. Hence the resort to devices for expediting business which were not needed in the leisurely days of the eighteenth century, devices such as those which we know among ourselves as the closure and the guillotine, devices the use of which everyone criticises and regrets, but which everyone admits to be necessary.

Last summer the House of Commons appointed a select committee to consider its rules of procedure and to suggest amendments. There have been a great many select committees on this subject during the last eighty years, and you will find a good account of them, of the suggestions which they have made, and of the results of those suggestions, in Professor Redlich's historical account of the procedure of the House of Commons, a book which has been translated

into English. So this last committee had many predecessors. It had not proceeded very far with its labours before the end of the session but it will doubtless be reappointed, and its chairman has expressed a desire for information about the procedure of other legislative bodies. Any hints, suggestions, or information bearing on the subject, would, I feel sure, be gratefully received.

Of all comparisons between legislative procedure in different countries, the most instructive probably for Englishmen is that between the procedure of Parliament and the procedure of legislatures in the United States, and especially of Congress, because it shows to Englishmen how a people starting with the same habits, traditions, and modes of thought as their own, may, by making a cardinal point of a different constitutional principle, the severance of executive and legislative authority, arrive at curiously different results. On this difference, a difference based on a principle of your constitution, I touched at the outset of my lectures. The chief point of resemblance between English and American legislation, as compared with legislation on the continent of Europe, is the desire in both America and in England to be governed by fixed written rules and to leave as little scope as possible to official discretion, and the consequent minuteness of detail into which legislation in both countries descends.

As to differences of legislative procedure, the chief difference that strikes an English observer, — apart from the absence of control by the executive over the passage of bills through the legislature, — is that much more of your legislative work is done by and in committees, and much less in the House itself, and that the committees of Congress which deal with bills are standing committees appointed for the

consideration of particular subjects. In Congress, I understand, the first and second reading of a bill are mere formalities; the discussions in committee are private, though there may be public hearings before the committee, and when a bill emerges from a committee, if it ever does emerge, the amount of time allowed for the discussion in the House itself is confined within limits far narrower than those allowed by the most ruthless application of the guillotine at Westminster. Our own legislative procedure I have already described and I need not repeat the description here.

In judging English Acts of Parliament it must be remembered that the defects with which they are chargeable are in great measure directly due to the principles of the constitution under which they are framed. In the first place, an ordinary Act of Parliament is essentially a creature of compromise. In point of form, it is a compromise between the terms of art demanded by the lawyer and the popular language required by the layman. If the lawyer finds such a term as "land" loose and slipshod, to the layman "hereditament" is pedantic and unintelligible. The result is that the layman usually finds his satisfaction in the text, and the lawyer has to be consoled with a definition. In point of arrangement, an Act is a compromise between the order most convenient for debating a bill and the order most convenient for administering an Act. In point of substance, a bill as it enters Parliament may be, and as it emerges frequently is, a compromise between divergent views. It is the work of many minds, and the product of many hands. Now compromise and co-operation are admirable things in politics, but they do not always tend to clearness or accuracy of style, logical arrangement, or consistency, in literary composition.

It is a marvel that our English Acts are as decent in form

as they are, considering the conditions under which they are produced. At first sight nothing would seem more preposterous than to submit a complicated draft for criticism and correction to a miscellaneous assembly of 670 persons. But if the member in charge of a bill is a minister with a compact and strong following at his back, and if he has the qualities which command the confidence and respect of the House, he can retain control over both the form and the substance of his bill through all the vicissitudes of a long discussion in committee. It is true that the qualities required for the successful steering of a complicated and controversial bill through committee are qualities of a very high order. They include tact, readiness, resourcefulness, firmness, and, above all, patience and good temper. The slightest appearance of dictation, the slightest loss of temper, will often set the House aflame. But if the minister can be conciliatory without "wobbling," can distinguish between amendments which are fatal to his scheme and those which are not, can by a happy and timely suggestion indicate the way out of a confusing discussion and can suppress his own impatience until it is shared by the committee, he can, without going to a division, often persuade his critics either to withdraw, or to modify, or to postpone their amendments, or, at the worst, make his assent to their acceptance subject to further consideration at a later stage of the bill. Qualities of this kind are not rare among English statesmen, and are developed by parliamentary training. Those who have been in the habit of attending legislative discussions, whether in committee of the whole House or in any of the grand committees, cannot fail to have been struck by their display and to have been also impressed by the good sense, good temper, *and readiness* to adopt compromises and accept reasonable

assurances which characterise a committee, except when it has got "out of hand."

Our legislative procedure in England, and doubtless yours in the United States also, is far, very far, from being ideal. But in seeking for lines of improvement we must always, we in England, you in America, bear in mind the principles of our respective constitutions, and the conditions under which our legislatures act. An obvious criticism on our English legislative procedure, and one which is often made by members of the legal profession, is that the defects of our laws are due to the clumsy and ignorant interference of Parliament. "Leave the drafting of laws to experts, and the grumbles of the legal profession and of the public would cease." And the authority of John Stuart Mill is sometimes cited in support of this proposition. He, as those who have read his work on Representative Government may remember, would have handed over the framing of laws to a standing commission of experts, acting under general parliamentary instructions. I hardly think that this suggestion would commend itself as practicable either to you in America or to us in England. No doubt it is very desirable that when a bill has been through the rough and tumble of discussion and amendment in committee, its form should undergo examination by an expert. And an English government bill is so examined, so far as time permits, by the government draftsman, who suggests amendments to be made either at the report stage in the House of Commons, if the bill is initiated there, or, still later, when the bill passes through the House of Lords. So far as my experience goes, the great majority of amendments made in public bills in the second chamber are suggested by the promoters of the bill, either for the purpose of removing formal defects or for the purpose of conciliating

opponents. With reference to such amendments it would perhaps be more accurate to say that our House of Lords is used, than that it acts, as a revising body.

As to the lines on which reform of our parliamentary procedure is likely to be conducted, or ought, in my opinion, to be conducted, you will not expect me to commit myself. There are, however, two things which I may venture to say. I think that the modern tendency to delegate the power of making rules and orders on matters of minor importance requires to be carefully watched, but is a tendency in the right direction. The more a legislature confines itself to the determination of principles with which it is fitted to deal, and the less it extends its activities to the elaboration of details with which it is not fitted to deal, the more it is likely to retain effective control over legislation. I think also that the language and detailed provisions of a bill can be better settled by a committee than by the whole body of the legislature, and that the smaller a committee, the better it is qualified to do this work. And if any member of Parliament should object, as members of Parliament sometimes do object, that the delegation of legislative work to committees means a limitation of his powers and duties as a legislator, I should be disposed to remind him that there are limits to human intelligence, even to the intelligence of a legislator, and that the legislator who thinks himself not only entitled but bound to put his finger into every legislative pie and to scrutinise every measure submitted for the approval of the body to which he belongs, may possibly be placing an exaggerated estimate both on his intelligence and on his responsibilities.

I must bring my lectures to a conclusion. When I accepted your president's flattering request to deliver them,

I made up my mind that there was one thing which I would not attempt to do, which I would avoid any appearance of doing. I would not lecture you on the way in which you ought to make your laws. To attempt such a thing would have been an impertinence.

But there was one thing which I thought I might reasonably attempt; that was to give you some of the results of my own experience as a draftsman of legislative measures, and leave you to draw your own conclusions. That is what I have attempted to do in, I fear, a very incomplete and fragmentary manner, so that my lectures might not unfairly be described as desultory remarks on legislation.

But there is one point which I desire to impress upon you, and that is the limitation of my subject. It was to indicate that limitation as clearly as I could that I proposed to entitle the subject-matter of my discourses "The Mechanics of Law Making." What I have been talking about is mere machinery. I have confined myself to machinery, and have not attempted to examine or formulate the principles of law or the principles of legislation.

Now machinery is a very good thing; good machinery is an excellent thing. But good machinery will not produce good laws, any more than good machinery will produce a good book. Legislation is part of statesmanship, one of the most important parts. The man who has the insight to perceive the needs of his country and of his time, who is so imbued with the principles of statesmanship as to know how far those needs ought to be met and can be met by legislation, who has the foresight and constructive imagination required to devise an appropriate remedy for the evil of which he has become aware, who possesses those qualities of industry, patience, tact, knowledge of human nature,

oratory, persuasiveness, which are needed for the successful steering of a legislative measure through a popular assembly, — that man is a great statesman. Such men are rare, and when such men are not found, good legislation is difficult, if not impossible, to accomplish. Unless a country has such statesmen, and unless it has also a sound public opinion to direct and contend the action of its legislatures, it will not have good laws.

A great legislator is a great artist, in the wide sense that a great architect or a great engineer is a great artist, a man of great constructive imagination. But a great artist does not disdain, cannot afford to disdain, the mastery of his rules of technique. He knows the value of his tools, he knows how much he is dependent on the co-operation of skilled and trained assistants. And it is to some of these rules of technique, to some parts of the machinery which has been and is employed by those who are engaged in the great and difficult work of legislation, to the training and experience which are required for those who are to assist in this work, that I have endeavoured to direct your attention, and I hope that I have not wasted your time.

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